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No. 2091

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS EVANS,

Plaintiff in Error.

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

**STIPULATED
TRANSCRIPT OF RECORD.**

**Upon Writ of Error to the United States Circuit
Court for the District of Oregon.**

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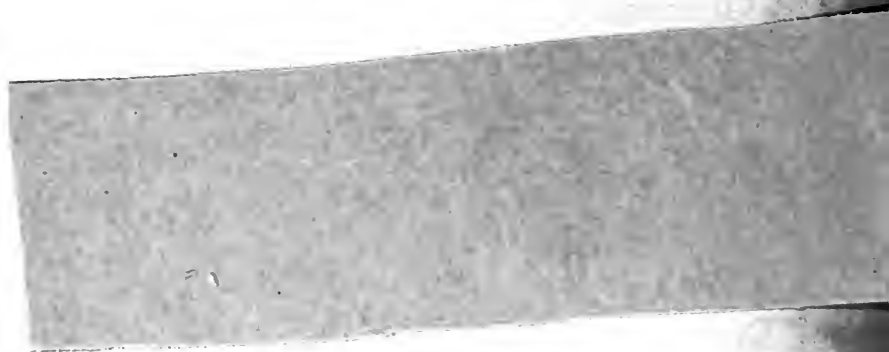
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Records of U.S. Circuit
Court of Appeals
726



No.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS EVANS,

Plaintiff in Error.

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

TRANSCRIPT OF RECORD.

**Upon Writ of Error to the United States Circuit
Court for the District of Oregon.**

Names and Addresses of Attorneys of Record.

C. D. and D. C. LATOURETTE and G. E. HAYES,
Oregon City, Oregon, and JOHN M. GEARIN and
J. R. LATOURETTE, Portland, Oregon,

Attorneys for Plaintiff in Error.

WM. D. FENTON and BEN C. DEY, Portland,
Oregon,

Attorneys for Defendant in Error.

INDEX.

	Page
Addresses and Names of Attorneys of Record . . .	ii
Answer, Defendant's	7
Assignment of Errors	374
Attorneys of Record, Names and Addresses of . .	ii
Bill of Exceptions	18
Bill of Exceptions, Order Extending Time to Prepare, etc.	17
Bond on Writ of Error	376
Citation on Writ of Error, Original	1
Complaint	3
Defendant's Answer	7
Exceptions, Bill of	18
Exceptions, Bill of, Order Extending Time to Prepare, etc.	17
Judgment of Nonsuit, etc., Motion for	220
Motion for a New Trial	15
Motion to Set Aside Verdict	16
Motion for a Verdict for the Defendant, etc. . . .	366
Nonsuit, etc., Motion for Judgment of	220
Order Allowing Writ of Error	375
Order Dated August 14, 1911, Extending Time to File Transcript of Record	379
Order Dated October 3, 1911, Extending Time to File Transcript of Record	381
Order Extending Time to Prepare, etc., Bill of Exceptions	17
Original Citation on Writ of Error	1
Petition for Writ of Error	372
Reply	11

Index.	Page
Testimony on Behalf of Plaintiff:	
Thomas J. Evans	19
Thomas J. Evans (cross-examination)	36
Thomas J. Evans (redirect examination) ..	61
Thomas J. Evans (recross-examination) ..	63
Thomas Evans (recalled)	213
Thomas Evans (recalled-cross-examina- tion)	214
Thomas J. Evans (recalled—in rebuttal) ..	354
Peter James Emmett	63
Peter James Emmett (cross-examination) ..	78
Peter James Emmett (redirect examina- tion)	92
Peter James Emmett (examination by the Court)	96
Peter James Emmett (redirect examina- tion)	96
Peter James Emmett (recalled—in rebut- tal)	357
Charles Howard Elston	97
Charles Howard Elston (cross-examination)	112
Charles Howard Elston (examination by the Court)	121
Charles Howard Elston (redirect examina- tion)	121
Charles Howard Elston (recross-examina- tion)	121
Charles Howard Elston (redirect examina- tion)	125
Charles Howard Elston (recalled—in rebut- tal)	355

Index.	Page
Charles Howard Elston (recalled—in rebuttal)	358
Charles Howard Elston (in rebuttal—cross-examination)	362
Thomas Fox	137
Thomas Fox (cross-examination)	144
Roy Fox	171
Roy Fox (cross-examination)	174
Charles N. Haines	158
Charles N. Haines (cross-examination) ...	163
Charles N. Haines (redirect examination)..	167
Charles N. Haines (recross-examination)..	169
Charles N. Haines (recalled—in rebuttal)..	363
Charles N. Haines (in rebuttal—cross-examination)	365
Charles N. Haines (in rebuttal—redirect examination)	365
J. T. Harbin	185
J. T. Harbin, (cross-examination)	189
J. T. Harbin (redirect examination)	199
James E. Headrick	200
James E. Headrick (cross-examination) ...	205
Archie Worthington	126
Archie Worthington (cross-examination)..	134
Testimony on Behalf of Defendant:	
F. S. Crow	282
F. S. Crow (cross-examination)	293
F. S. Crow (recalled—direct examination). .	302
F. S. Crow (cross-examination)	304
J. M. Coon	309
J. M. Coon (cross-examination)	313
Harry A. Hampton	244

Index.	Page
Harry A. Hampton (cross-examination) . . .	256
Harry A. Hampton (redirect examination) .	262
Harry A. Hampton (recross examination) .	263
Harry A. Hampton (redirect examination) .	263
L. D. Keyzer	319
L. D. Keyzer (cross-examination)	332
L. D. Keyzer (examination by the Court) . .	336
L. D. Keyzer (cross-examination)	336
L. D. Keyzer (redirect examination)	340
J. E. McCutcheon	263
J. E. McCutcheon (cross-examination)	270
J. E. McCutcheon (redirect examination) . .	273
J. R. McRae	221
J. R. McRae (cross-examination)	238
J. R. McRae (redirect examination)	244
H. N. Mooney	273
H. N. Mooney (recalled—direct examination) tion)	304
H. N. Mooney (cross-examination)	306
N. P. Scruggs	341
N. P. Scruggs (cross-examination)	351
Transcript of Record, Order Dated August 14, 1911, Extending Time to File	379
Transcript of Record, Order Dated October 3, 1911, Extending Time to File	381
Verdict of the Jury	14
Writ of Error, Bond on	376
Writ of Error, Order Allowing	375
Writ of Error, Original, Citation on	1 ^c
Writ of Error, Petition for	372

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To Southern Pacific Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of Oregon, wherein Thomas J. Evans is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 2nd day of August, in the year of our Lord, one thousand, nine hundred and eleven.

CHAS. E. WOLVERTON,

Judge.

Service by copy admitted this 4th day of August, 1911.

WM. D. FENTON,

Of Attorneys for Defendant, Southern Pacific Company.

Filed August 4, 1911. G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. ———.

THOMAS J. EVANS,

Plaintiff in Error.

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America, To
the Judges of the Circuit Court of the United
States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in
the rendition of the judgment of a plea which is in
the said Circuit Court before the Honorable Chas. E.
Wolverton, one of you, between Thomas J. Evans,
Plaintiff in Error, and Southern Pacific Company,
Defendant in Error, a manifest error hath happened
to the great damage of the said Plaintiff in Error, as
by complaint doth appear; and We, being willing that
error, if any hath been, should be duly corrected, and
full and speedy justice done to the parties aforesaid,
and in this behalf, do command you, if judgment be
therein given, that then, under your seal, distinctly
and openly, you send the record and proceedings
aforesaid, with all things concerning the same, to the
United States Circuit Court of Appeals for the Ninth
Circuit, together with this writ, so that you have the

same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 29th day of July, A. D., 1911.

G. H. MARSH,

Clerk of the Circuit Court of the United States for the District of Oregon.

Filed July 29th, 1911. G. H. Marsh, Clerk United States Circuit Court of Appeals, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1909.

Be it remembered, that on the 4th day of March, 1909, there was duly filed in the Circuit Court of the United States for the District of Oregon, a complaint being a part of the Transcript of Record from the Circuit Court of the State of Oregon for Clackamas County. in words and figures as follows, to-wit:

*In the Circuit Court of the State of Oregon, for the
County of Clackamas.*

THOMAS EVANS,

Plaintiff.

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

The plaintiff above named, complaining of the said defendant, for cause of action, alleges:

That at all the times hereinafter mentioned the defendant was, and now is, a corporation, duly organized and existing under the laws of the State of Kentucky, and engaged in the maintenance and operation of a commercial railroad between the City of Portland, Multnomah County, Oregon, and the town of Oswego, in the County of Clackamas, State of Oregon.

That, to-wit, on the 25th day of September, 1909, the plaintiff, who was then a resident of Portland, being desirous of making a trip over the defendant's said road from the said city of Portland to the said town of Oswego and return by way of Wilsonia, a station on defendant's said line immediately North of said town of Oswego, then purchased from defendant, at its office in the city of Portland, a regular ticket, paying therefor the regular fare from said city of Portland to said town of Oswego and return by way of said Wilsonia station.

That on the afternoon of said day the plaintiff

traveled on said ticket over defendant's said road to said town of Oswego, and in the evening of said day, being desirous of returning to his home over defendant's said road as a passenger on his said return ticket, plaintiff undertook to make his departure by means of defendant's regular train from Wilsonia, the station on defendant's line hereinbefore mentioned.

That in order to reach said Wilsonia Station, it became convenient for the plaintiff to travel thence, and he then and there undertook to go by means of an open and commonly used trail from the county road to the defendant's unfenced right-of-way, across a footbridge then and there being situate, which bridge spanned a ditch on the Westerly side of, and wholly within defendant's said right-of-way, up to and upon defendant's roadbed, at a point about — feet Southerly from said Wilsonia Station, and thence along defendant's roadbed to said last named station.

That as plaintiff crossed from said county road to defendant's right-of-way he could see, and did see, the side lights of defendant's regular passenger train standing at said Wilsonia station, which train was headed towards the said city of Portland, apparently about ready to depart on its run from said Wilsonia to the city of Portland.

That the said trail, footbridge and roadway from said bridge to Wilsonia was then, and, for many months immediately prior to said date, had been con-

tinuously used by the public generally, and particularly by persons desiring to take defendant's trains at Wilsonia, for purposes of travel, all of which uses were, during all such times, well known to the defendant, and permitted, consented to and acquiesced in by defendant, and, from all appearances, the public, and especially the patrons of defendant's said road, were invited by defendant so to travel thereon, as aforesaid.

That after the plaintiff had so crossed said foot-bridge and was traveling up to said Wilsonia station over defendant's said roadbed, at about 10:45 P. M. of said evening, in order to board said train, and while it was so dark that plaintiff could not see any movement or motion of said train, the defendant, then and there disregarding its duty to the public, and to the plaintiff, willfully, carelessly and negligently, without the usual or any light or signal on the rear end of said train or without ringing the bell or sounding whistle or signal of warning, or notice, and without the knowledge of, or fault on the part of the plaintiff, suddenly and swiftly backed said train in the darkness of the night, against and upon the plaintiff while he was so traveling to said Wilsonia station to take defendant's train, as aforesaid, thereby violently striking and colliding with the plaintiff, precipitating him to, and prostrating him upon the defendant's roadbed and running the wheels of said train upon

and over his person, thereby crushing one of his lower limbs, so that it became necessary to amputate the same, and otherwise bruising and injuring him, thereby causing plaintiff great loss of blood, physical pain and mental anguish and permanent disability.

That by reason of such injuries and disability, so caused by the negligent acts and omissions of the defendant, as aforesaid, the plaintiff sustained damages in the sum of Twenty Thousand Dollars.

WHEREFORE, Plaintiff prays judgment against the defendant for \$20,000 and costs.

G. E. HAYES,

C. D. and D. C. LATOURETTE,

Attorneys for Plaintiff.

Filed March 4, 1910. G. H. Marsh, Clerk Circuit Court of United States for District of Oregon.

And afterwards, to-wit, on the 8th day of April, 1910, there was duly filed in said Court, an Answer, in words and figures as follows, to-wit:

Answer

In the Circuit Court of the United States for the District of Oregon.

THOMAS EVANS,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Comes now the defendant above named and ans-

wering plaintiff's complaint heretofore filed herein, admits, denies and alleges as follows, to-wit:

Denies each and every allegation in said complaint except that defendant admits that it is a corporation duly organized and existing under the laws of the State of Kentucky and engaged in the maintenance and operation of a commercial railroad between the City of Portland, Multnomah County, Oregon, and the town of Oswego, in the County of Clackamas, State of Oregon.

And for a first further and separate answer and defense to said complaint, defendant alleges the following facts, to-wit:

I.

That at the time and place of the accident described in plaintiff's complaint, and while defendant was lawfully operating one of its trains from the station of Wilsonia to the station of Oswego along its railroad line in Clackamas County, Oregon, and while said train was being operated in a careful and prudent manner at a lawful and reasonable rate of speed, and otherwise managing said engine and train with ordinary care and the usual and ordinary signals being given as said engine and train approached said station of Oswego, plaintiff came upon the right of way and track of this defendant at said time and at a place along said right of way where passengers were neither received nor discharged, and at a place where neither the plaintiff nor the public had any right or

license to be or enter upon, and said plaintiff did then and there, without any care whatever, carelessly, recklessly and negligently run along and between the rails of this defendant's roadbed in the direction from which said train was approaching, and did carelessly and negligently and without exercising any precaution or paying any attention whatever to the signals of approach of said train, which were then and there given, and said plaintiff without either looking or listening or stopping to look or listen for the approach of said engine and train, and without any care whatever, then and there ran into and came into collision with one of the cars of said train and received whatever injuries, if any, he has sustained in that behalf; that said injuries and damages, if any, so suffered and received by plaintiff, were caused wholly by reason of plaintiff's own want of care and negligence, as aforesaid, and without any fault or negligence on the part of the defendant or any of its servants or agents.

II.

That at the time and place when and where plaintiff received whatever injuries he has suffered in that behalf, he was wrongfully trespassing upon the tracks and property of the defendant, Southern Pacific Company, which said tracks were then and there being lawfully used by said defendant.

WHEREFORE, defendant demands that this ac-

tion be dismissed and that it have judgment for its costs and disbursements herein.

WM. D. FENTON,
R. A. LEITER,
BEN C. DEY,
Attorneys for Defendant.

District of Oregon,
County of Multnomah,—ss.

I, W. W. Cotton, being first duly sworn, depose and say that I am the statutory agent and attorney in fact of the defendant, Southern Pacific Company, in the above entitled suit; and that the foregoing answer is true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 6th day of April, 1910.

(Seal) BEN C. DEY,
Notary Public for the State of Oregon.

District of Oregon,
County of Clackamas,—ss.

Due service of the within answer is hereby accepted in Clackamas County, Oregon, this 7th day of April, 1910, by receiving a copy thereof, duly certified to as such by B. C. Dey, of Attorneys for Defendant.

C. D. LATOURETTE, of
Attorneys for Plaintiff.

Answer. Filed April 8, 1910. G. H. Marsh, Clerk
U. S. Circuit Court, District of Oregon.

And afterwards, to-wit, on the 11th day of April, 1910, there was duly filed in said Court, a Reply, in words and figures as follows, to-wit:

Reply.

In the Circuit Court of the United States for the District of Oregon.

THOMAS EVANS,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Comes now the plaintiff above named and for Reply to the first further separate answer and defense set up in defendant's Answer herein.

Denies each and every allegation of Paragraph I of said separate answer and defense.

Denies each and every allegation of Paragraph II of said separate answer and defense.

Denies each and every allegation of defendant's second separate answer and defense.

Wherefore plaintiff prays for judgment against defendant as in the Complaint demanded.

G. E. HAYES,

C. D. and D. C. LATOURETTE,

Attorneys for Plaintiff.

State of Oregon,

County of Clackamas,—ss.

I, Thomas Evans being first duly sworn depose

and say that I am the plaintiff in the above entitled action; and that the foregoing Reply is true, as I verily believe.

Subscribed and sworn to before me this 10th day of April, 1910.

Notary Public for the State of Oregon.

State of Oregon,

County of Multnomah,—ss.

Due service of the within Reply is hereby admitted in said County, Oregon, this 10th day of April, 1910, by receiving a copy thereof, duly certified to as such, by C. D. Latourette, Attorney for Plaintiff.

WM. D. FENTON,

Attorney for Defendant.

Reply. Filed April 11, 1910. G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 19th day of December, 1910, the same being the 66th Judicial day of the Regular October, 1910, Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States for the District of Oregon.

No. 3598.

THOMAS EVANS,

vs.

SOUTHERN PACIFIC COMPANY.

December 19, 1910.

Now, at this day, come the plaintiff by Mr. C. D.

Latourette, Mr. G. E. Hays and Mr. J. R. Latourette, of counsel, and the defendant by Mr. William D. Fenton and Mr. Ben C. Dey, of counsel: And the jury empanelled herein being present and answering to their names, thereupon W. R. Drury, one of said jurors, requests that he may be excused from further attendance upon the Court; and it appearing that said juror is sick and unable to attend further upon the Court, IT IS ORDERED that said W. R. Drury be, and he is hereby excused from further attendance upon this Court as a juror, and, thereupon, the parties to this cause consenting thereto, the trial of this cause is resumed before the remaining eleven jurors. Whereupon, said jury proceed to hear the evidence adduced. And said jury having heard all the evidence adduced, the arguments of counsel and the charge of the Court, without retiring from the jury box return into Court the following verdict, viz.:—“We the jury in the above entitled action find for the Defendant. C. E. Staats, Foreman,” which verdict is received by the Court and ordered to be filed. Whereupon, on motion of said defendant for judgment upon said verdict, IT IS CONSIDERED that said plaintiff take nothing by this action, that said defendant go hence without day, and that it do have and recover of and from said plaintiff its costs and disbursements herein, taxed at \$103.80. Whereupon, on motion of said plaintiff, IT IS ORDERED that he be, and is hereby, allowed thirty days from this date

in which to submit a bill of exceptions herein and to file a motion to set aside the verdict and judgment and for a new trial herein.

And afterwards, to-wit, on the 19th day of December, 1910, there was duly filed in said Court, a Verdict, in words and figures, to-wit:

A Verdict.

In the Circuit Court of the United States for the District of Oregon.

THOMAS EVANS,

Plaintiff.

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

We, the jury in the above entitled action, find for the Defendant.

C. E. STAATS,

Foreman.

Verdict. Filed December 19, 1910. G. H. Marsh,
Clerk.

And afterwards, to-wit, on the 17th day of January, 1911, there was duly filed in said Court, a Motion for New Trial, in words and figures as follows, to-wit:

A Motion for a New Trial.

*In the Circuit Court of the United States for the
District of Oregon.*

THOMAS EVANS,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Comes now the plaintiff above named, by the undersigned, his attorneys, and moves the Court for an order setting aside the verdict and judgment heretofore in said cause rendered for the following reason:

The trial judge erred in directing the verdict for the defendant at said trial as such direction was against the law as applied to the evidence in the case.

C. D. & D. C. LATOURETTE,

Attorneys for Plaintiff.

Due and legal service of the above motion is hereby admitted this 17th day of January, 1911.

BEN C. DEY,

Of Attorneys for Defendant.

Motion for New Trial: Filed January 17, 1911.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Wednesday, the 5th day of April, 1911, the same being the 158th Judicial day of the Regular October, 1910, Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding,

the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States for the District of Oregon.

No. 3598.

THOMAS EVANS,

vs.

SOUTHERN PACIFIC COMPANY.

April 5, 1911.

Now, at this day, come the plaintiff by Mr. C. D. Latourette, of counsel, and the defendant by Mr. Ben C. Dey, of counsel; Whereupon, this cause comes on to be heard upon the motion of the plaintiff to set aside the verdict filed herein and for a new trial herein. And the Court having heard the arguments of counsel, IT IS ORDERED that said motion be, and the same is hereby, denied. Whereupon, on motion of said plaintiff, IT IS ORDERED that said plaintiff be, and he is hereby, allowed sixty days from this date within which to submit a bill of exceptions herein.

And afterwards, to-wit, on Thursday, the 1st day of June, 1911, the same being the 45th Judicial day of the Regular April, 1911, Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3598.

THOMAS EVANS,

v.

SOUTHERN PACIFIC COMPANY.

June 1, 1911.

Now, at this day, on motion of Mr. J. R. Latourette, of counsel for the plaintiff in the above entitled cause, IT IS ORDERED that said plaintiff be, and he is hereby, allowed forty five days' further time within which to prepare and submit his bill of exceptions herein.

And afterwards, to-wit, on Wednesday, the 12th day of July, 1911, the same being the 79th Judicial day of the Regular April, 1911, Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3598.

THOMAS EVANS,

vs.

SOUTHERN PACIFIC COMPANY.

July 12, 1911.

Now, at this day, on motion of Mr. John R. Latourette, of counsel for the plaintiff, IT IS ORDERED

that said plaintiff be, and he is hereby, allowed thirty days' further time within which to prepare and submit a bill of exceptions herein.

And afterwards, to-wit, on the 20th day of July, 1911, there was duly filed in said Court, a Bill of Exceptions in words and figures, to-wit:

A Bill of Exceptions.

In the Circuit Court of the United States for the District of Oregon.

THOMAS EVANS,

Plaintiff.

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Be It Remembered, That at the trial of the above entitled cause in the above entitled Court, begun December 16, 1910, before the Court and a jury called, empaneled and sworn to try the same, the following proceedings were had:

The plaintiff, to sustain the issues on his part called and examined the following named witnesses, whose testimony is hereby incorporated into this Bill of Exceptions:

Portland, Oregon, December 16, 1910, 10 A. M.

THOMAS EVANS, A witness in his own behalf. being first duly sworn, testified as follows:

Direct Examination.

(Testimony of Thomas J. Evans.)

(Questions by Mr. Latourette.)

Mr. Evans, what is your full name?

A. Thomas Evans.

Q. And how old are you?

A. Twenty-two.

Q. And where do you reside?

A. At Beaver Creek.

Q. What county?

A. Clackamas.

Q. And what is your occupation?

A. Farmer.

Q. Now, during September—you are the plaintiff in this case, are you?

A. Yes, sir.

Q. During September, 1909, what were you engaged in?

A. I was driving team for my cousin.

Mr. Fenton: I do not hear you, Mr. Evans.

A. I was driving team for my cousin.

Q. At what place?

A. Portland.

Q. On the 25th of September, 1909, where did you go to from Portland?

A. To Oswego.

Q. How did you go?

A. On the train.

Q. On what road?

A. Southern Pacific.

(Testimony of Thomas J. Evans.)

Q. Now, did you have any ticket?

A. Yes, sir.

Q. What kind of a ticket had you?

A. Had a return ticket.

Q. What time did you go out there—what time of day?

A. Well, it must have been about four o'clock some time.

Q. Oh, in the afternoon?

A. Yes, sir.

Q. Had you been out there before?

A. Yes, sir.

Q. Over this line?

A. Yes, sir.

Q. Did you say you had a return ticket?

A. Yes, sir.

Q. Have you got any part of that ticket left?

A. Yes, sir, I have got it all.

Q. Have you got it with you?

A. My father has got it.

Q. You went up on the railroad, did you?

A. Yes, sir.

Q. What time did you undertake to return to Portland?

A. 10:45.

Q. You mean 10:45 in the evening?

A. Yes, sir.

Q. Examine the little paper I hand you and state

(Testimony of Thomas J. Evans.)

if that is what you refer to when you speak of a return ticket.

A. Yes, sir, that is just what it is.

Mr. LATOURETTE.—Would you like to look at it?

Mr. FENTON.—No objection to it.

Mr. LATOURETTE.—I offer it in evidence.

(Marked Plaintiff's Exhibit A).

Mr. LATOURETTE.—That will be considered as read to the jury.

Mr. FENTON.—Yes; I don't know whether the jury can make out the date on the back.

COURT.—I suppose there is no dispute as to the date.

Mr. FENTON.—No, I think not.

Q. Is this the ticket you went out there on, to Oswego?

A. Yes, sir. That is the one I got at the station here.

Q. But tore off the half you used going out?

A. Yes, and handed me this back.

Q. Handed you this back?

A. Yes, sir.

Mr. FENTON.—As I understand, Mr. Latourette, he bought a ticket to Oswego and return.

Mr. LATOURETTE.—Yes, this is the half he had.

Mr. FENTON.—Oswego was his station he got on and off.

(Testimony of Thomas J. Evans.)

Q. Now, what did you do that evening with anybody?

A. Well, we went coon hunting that evening.

Q. Who?

A. Me and Pete Emmet and the Worthington boys.

Q. Coon hunting?

A. Yes, sir.

Q. Around up there in that neighborhood?

A. Yes, sir; up there about two miles.

Q. How far from Oswego?

A. About two miles, I believe.

Q. Up on the lake there?

A. No, I believe it was above the lake.

Q. Above the lake. Now, what time did you come back, Mr. Evans, to take the train?

A. Well, we left—the boys were still hunting when we left, and we left about 10 o'clock.

Q. What train did you aim to catch to go back to Portland?

A. The 10:45.

Q. Now, you say you had been up there before?

A. Yes, sir, several times.

Q. And whenever you went up there, just tell the jury what you observed about the way the train made that flying switch so they will understand.

A. Well, every time I went up there before they always went to the station of Oswego, and then went

(Testimony of Thomas J. Evans.)

on a little further south and switched. And they did that night when I went up; but while I was up there—I suppose it was the first train that was ever switched—they stopped at Wilsonia before they got to Oswego and switched there.

Q. Now, is that the way they did it on the day that you went up?

A. No, sir; they went past Oswego the day I went up.

Q. Well, that is what I say.

A. Yes, sir.

Q. Now, you went up about 4 o'clock?

A. Yes, sir.

Q. And they made the flying switch at Oswego?

A. Yes, sir, at Oswego, south of the station.

Q. That is, right near the station there?

A. Well, just a little ways.

Q. And when you came back to—this Emmet, did he live in Oswego?

A. Yes, sir.

Q. Your friend Emmet?

A. Yes, sir.

Q. He was a young man living there?

A. Yes, sir.

Q. And when you came back, what station did you intend to take the train from?

A. We intended to take it at Oswego.

Q. You intended to come back by way of Oswego?

(Testimony of Thomas J. Evans.)

A. Yes, sir.

Q. And did you start to go up to Oswego?

A. Yes, sir, that is where we started to.

Q. To take the train?

A. Yes, sir.

Q. What time of the evening was that?

A. Well, that was—we didn't know the exact time, but we knew we didn't have much time to get the train.

Q. Did you have any watch with you?

A. No, sir, I didn't.

Q. Did your friend Emmet have any watch?

A. No, sir, I don't believe he did.

Q. Well, now, from where you went up to the railroad track, could you see the station of Oswego and Wilsonia both?

A. Yes, sir.

Q. That is to say, it was open view there?

A. Yes, sir.

Q. And this Wilsonia is on that line of road, is it?

A. Yes, sir.

Q. How is it situated with regard to Oswego— which direction is it from Oswego?

A. Why, it is north.

Q. And about what distance?

A. About—I measured it one time—1300 feet.

Q. About 1300 feet between Oswego and Wilsonia station?

(Testimony of Thomas J. Evans.)

A. Yes, sir, Wilsonia.

Q. This Wilsonia station was a station on the line of the Southern Pacific road, and you could take the train there for Portland, could you, as well as at Oswego?

A. Yes, I could do that.

Q. Now, when you came up to the railroad track, was there any fence or anything to obstruct your passage?

A. No, sir, nothing at all.

Q. Was the railroad track fenced or inclosed between—any part of the way between Wilsonia and Oswego?

A. No, sir.

Q. What kind of a road or path was there leading up to the railroad right of way where you approached it?

A. Why, it was a regular traveled path—it was good traveling.

Mr. FENTON.—I didn't understand him.

Mr. LATOURETTE.—Regularly traveled path.

Q. Well beaten and well marked, was it?

A. Yes, sir.

Q. Had you seen it there before?

A. Yes, sir.

Q. Been over it before?

A. Yes, sir.

Q. What was there in the nature of a bridge?

(Testimony of Thomas J. Evans.)

A. Why, there was a little foot bridge coming up to the railroad track there.

Q. How was that built?

A. Why, I believe it was sidewalk with a rail on each side.

Q. Out of plank?

A. Yes, I believe it was.

Q. Plank railing on each side of the bridge?

A. No, sir, there was a pole railing on each side.

Q. Pole railing on each side of the bridge?

A. Yes, sir.

Mr. FENTON.—Where was this bridge?

Mr. LATOURETTE.—I will ask him.

Q. State where the bridge was.

A. Why, it was just off the railroad track; between the railroad track and the foundry.

Q. Well, did that bridge lead to any other place except the railroad track?

A. Why, it led to the foundry.

Q. I mean going that way, towards the track?

A. No, sir; I don't believe it did.

Q. And how near to the railroad track was that bridge?

A. Why, it wasn't—I don't know exactly how far it was, but it wasn't very far.

Q. Pretty close up, was it?

A. Yes, sir, not over a couple of hundred feet.

Q. What?

(Testimony of Thomas J. Evans.)

A. Not over a couple of hundred feet anyway.

Q. Now, was there any cattle guard?

A. No, sir, none at all.

Q. On the railroad right of way there?

A. No, sir.

Q. Between that bridge and Wilsonia?

A. No, sir.

Q. Was there any trespass notice, or anything else, so far as you observed?

A. No, sir, there was none.

Q. Now, describe to the jury how that train appeared to you when you saw it standing there.

A. Why, it was headed toward Portland—the train was.

Q. What could you see?

A. I could see the side lights and the engine there. Everything looked like it was headed toward Portland.

Q. And how close was it to the time, as far as you were able to judge, when it would start to go?

A. Well, we thought it had already been to Oswego.

Q. Now, then, what did you do from that time, when you went across this bridge on to the track, just tell the jury what you did, and what you saw, and what occurred. Go ahead.

A. Well, we came right up on the track, and went right up the track, till it met me there and knocked me off.

(Testimony of Thomas J. Evans.)

Mr. FENTON.—I didn't hear.

A. We went up the track until the train hit me.

Q. Did you run?

A. No, sir, we started to run, and we was coming up the hill there; we had been running from the barn, and we was pretty well out of wind at that time.

Q. You started to run?

A. Yes, sir. We wasn't running at the time it hit me.

Q. How fast were you going when the train hit you?

A. As fast as I could walk.

Q. As fast as you could walk?

A. Yes, sir.

Q. Now, did you hear any bell rung?

A. No, sir.

Q. What?

A. No, sir.

Q. Did you hear any whistle?

A. None at all.

Q. Well, was there any bell rung or any whistle sounded on that train?

A. No, sir, there was not.

Q. On that occasion.

Recess until 2 P. M.

Portland, Ore., December 16, 1910, 2 P. M.

THOMAS EVANS resumes the stand.

Direct examination continued.

(Testimony of Thomas J. Evans.)

Q. Mr. Evans, what kind of a night was it?

A. Well, it was rather dark.

Q. Was it raining?

A. No, sir.

Q. Cloudy?

A. Yes, it was cloudy and dark.

Q. What was the date of that?

A. The 25th of September.

Q. At about what hour?

A. I don't know the exact time but it was along about 10:45.

Q. In the evening?

A. Yes, sir.

Q. What amount of noise, if anything, was that train making? Did you hear anything?

A. Never heard a thing.

Q. What was the country there? Was it level or hilly?

A. Why, it was practically level.

Q. What was the road bed as to being level or otherwise?

A. It was level.

Q. Now, as I understand you had come up from below, or from the south or from the east of the track?

A. Yes, sir.

Q. How does the track run—what direction?

A. North and south.

(Testimony of Thomas J. Evans.)

Q. Pretty near north and south?

A. Yes, sir.

Q. And you had come from which side?

A. From the east side.

Q. What part of your person did the train strike?

A. What is the question?

Q. Where did it hit you—the train?

A. Why, it hit me in the face and breast.

Q. What part of the train hit you?

A. The back end when it was backing up.

Q. Well, what part of the end hit you? Just point out to the jury where it hit you and how it hit you?

A. Why, it hit me in the face, in the nose, and in the breast and knocked me back.

Q. Well, what happened then after the train hit you?

A. It run over me.

Q. Knocked you down?

A. Yes, it knocked me down when it hit me.

Q. How did you fall?

A. I fell on my face.

Q. You fell on your face?

A. Yes, sir.

Q. Did it turn you around?

A. Yes, sir, it certainly did.

Q. Well, tell the jury how you fell and where you fell.

(Testimony of Thomas J. Evans.)

A. Well, I fell right across the rails in front of the train.

Q. What caused you to fall?

A. It struck me.

Q. Well, did you slip in any way?

A. No, sir.

Q. How far did the train run?

A. After it had struck me?

Q. After you were struck?

A. I should judge about the length of one coach.

Q. That would be about how many feet?

A. About 40 feet.

Q. Now, state was there anybody on the rear end of that train when you were struck?

A. No, sir.

Q. Was there any light there or anything?

A. Nothing at all.

Q. Well, were you looking and listening?

A. Yes, sir, I was looking straight ahead.

Q. What did they do with you after you were run over, Mr. Evans?

A. They picked me up, some of the men on the train, and took me to Portland.

Q. Where to?

A. To the hospital.

Q. What hospital?

A. Good Samaritan.

Q. Then tell the jury what was done?

(Testimony of Thomas J. Evans.)

A. They took off my leg about an inch above the knee.

Q. Is your limb so that you can show it to the jury where it was amputated?

A. Yes, sir.

Q. I wish you would just turn around there so as the jury can see.

Mr. FENTON.—Mr. Latourette, there is no dispute about the amputation.

Mr. LATOURETTE.—No, but I would like to have the present condition of the limb exhibited.

A. (Showing limb to jury): I have got two sores on each side here.

Q. What is that?

A. It is sore. Sore in here.

Q. How far was that above your knee, was that taken off, where would your knee come?

A. About out to here.

Q. Did you suffer any pain?

A. Yes, sir.

Q. How long were you in the hospital?

A. I believe it was nine weeks, but I am not sure to the exact time I was there.

Q. Under care of the surgeon all the time?

A. Yes, sir.

Q. After that where did you go?

A. I went home.

(Testimony of Thomas J. Evans.)

Q. Now, at the time that you were injured you say you were driving team?

A. Yes, sir.

Q. In Portland here?

A. Yes, sir.

Q. And what wages were you getting?

A. \$2.50 a day.

Q. Since that injury, have you been able to perform any labor?

A. Well, I can do a little, but I cannot do a man's work by any means.

Mr. LATOURETTE.—I suppose there will be no question, Mr. Fenton, that Wilsonia is a station on that line of road, and that he would be obliged to come back to that station?

Mr. FENTON.—No, we don't admit, Your Honor, that he would be obliged to come back to Wilsonia. Our contention would be that his ticket called for Oswego, and that he was not going towards Oswego at all. We don't deny but what there was a station about a quarter of a mile this side called Wilsonia.

Q. Now, in returning from Oswego to Portland on your ticket, would you be obliged to come through the station that is known as Wilsonia?

A. What is your question?

Q. I say in coming back from Oswego to Portland on your ticket, would you necessarily have to pass through Wilsonia?

(Testimony of Thomas J. Evans.)

A. Yes, sir.

Mr. FENTON.—You mean on the train?

Mr. LATOURETTE.—On the train.

Q. And could you have taken the train at Wilsonia as well as at Oswego?

Mr. FENTON.—I object to that as immaterial.

A. Yes, sir, I could.

Mr. FENTON.—I object to that as immaterial. I want to save the question, your Honor. I mean to say this: I don't want to keep out any testimony, but I want your Honor to be advised of our position. Here was a man who bought a ticket to Oswego and back. Now, he claims to be in contract relation with us as a passenger. He claims that we owed him a duty of care. He did not go to his station, Oswego, to return. He saw a train which he thought was coming to Portland. He was about half way between the two stations, and he made a run, or a walk, to get to not the station Wilsonia, but to the train. Now it will be our contention that he was not invited to do that. He was invited to Oswego. He had a right to go to Oswego.

COURT.—Was he not invited to any depot or any station between Oswego and Portland, as well as Oswego?

Mr. FENTON.—The train was between stations and was backing. He thought it was going the other way. Now, the point I make is that he had no right

(Testimony of Thomas J. Evans.)

to be between the rails going towards Wilsonia when he saw the train. I am just saving the question, your Honor, for the purpose of being consistent all the way through.

COURT.—Very well, the objection will be overruled.

Mr. FENTON.—Save an exception.

Q. Now, then, for what purpose were you going down that track?

A. Why, to get on the train to go to Portland.

Q. Now, you say you saw the train standing there.

A. Yes, sir, and I thought it was at Wilsonia.

Q. At Wilsonia station?

A. Yes, sir, that is where I thought it was.

Q. It was standing at the station, was it?

A. That is where I thought it was.

Q. Well, did you see it?

A. Yes, sir, I could see it.

Q. Do you know where the station was?

A. Just about, yes, sir.

Q. And could you see that the train stood there?

A. Yes, sir.

Q. And was it standing still?

A. Standing still when we saw it.

Q. Now, did you intend by going down that track to take the train, that particular train, the 10:45 train, back to Portland?

A. Yes, I intended to take it.

(Testimony of Thomas J. Evans.)

Q. From Wilsonia Station?

A. Yes, sir.

Q. And that was a station between Oswego and Portland?

A. Yes, sir.

Q. On the defendant's line of road?

Cross Examination.

(Questions by Mr. Fenton.)

Q. How old are you, Mr. Evans?

A. 22.

Q. When was your birthday?

A. The 3rd day of July.

Q. Last?

A. Yes, sir.

Q. And what were you doing before this particular day on the 25th of September?

A. I was driving team, for my cousin.

Q. Where?

A. In Portland, here.

Q. And working away from home, were you?

A. Yes, sir.

Q. How long had you been working away from home, and doing for yourself?

A. About two months.

Q. And you were living here in town?

A. Yes, sir.

Q. And how frequently had you been to Oswego over this railroad?

(Testimony of Thomas J. Evans.)

A. Why, I don't know how many times I was—
three or four times.

Q. You were raised not far from Oswego, were
you?

A. Yes, sir.

Q. How far away from there?

A. About 13 miles.

Q. And was Oswego your postoffice?

A. No, sir.

Q. Is that where you came to get on the train to
come to Portland when you were living at home?

A. Not when I was living at home.

Q. Which side of the river is your place, the home
place?

A. On the east side.

Q. On the Oregon City side?

A. Yes, sir.

Q. Well then, you had been to Oswego three or
four times recently before this?

A. Yes, sir.

Q. Well then, you were quite well acquainted with
the station, Oswego, were you not?

A. Yes, sir.

Q. And the surrounding country?

A. Yes, sir.

Q. And the track between Oswego and Wilsonia?

A. Yes, sir.

Q. Now, Oswego has been a station there for a
great many years, hasn't it?

(Testimony of Thomas J. Evans.)

A. Why, for quite awhile. I don't remember.

Q. How long has Wilsonia been a station before this accident?

A. I couldn't swear to that.

Q. Well, about how long?

A. I don't remember when it was put there, but it was there that summer.

Q. Yes, but you never got on or off at Wilsonia before in your life, did you?

A. No, sir.

Q. You always went to Oswego and got off, and you always got on at Oswego when you wanted to come back?

A. Yes, sir.

Q. And you never had been at the station of Wilsonia except to pass through it? You had never been at that station except to pass through it on the train, had you?

A. No, sir.

Q. Now, where were you coming from on that evening when you came up towards the right of way?

A. When we come from the right of way?

Q. When you came up from the east side of the track, as you now say in your testimony, where were you coming from?

A. I was coming from the barn where the iron works keep their horses.

Q. Now, where is that with reference to Oswego?

(Testimony of Thomas J. Evans.)

A. That is a little northeast of Oswego.

Q. How far away from the station?

A. Why, it is about—I don't know the exact distance how far it is. It is not very far.

Q. A quarter of a mile?

A. No, I don't believe it is that far.

Q. An eighth of a mile?

A. Not any more than an eighth of a mile.

Q. Down under the hill, isn't it?

A. Yes, sir.

Q. Now, you speak about crossing a bridge with some railing, that is laid across where you have entered upon the company's right of way. Was that from the east side of the right of way, or the west side of the right of way, that little bridge that you said you went onto?

A. It was on the west side. No, it was next to the river.

Q. Well, that is on the east side, isn't it?

A. Well, on the east side.

Q. Now, how far was that little bridge or culvert that you speak of, that is on the east line of the right of way, how far would you say that was from the Oswego station? In yards, roughly speaking?

A. Why it is—I couldn't say just how far it was.

Q. Well, I mean just judging the distance from the appearance?

A. Why, it is about three or four hundred feet down there, I suppose.

(Testimony of Thomas J. Evans.)

Q. And how far is it from that little culvert that you say you crossed over to get onto the right of way and the tracks of the company—how far is it from that point down to Wilsonia, in yards? You said three or four hundred feet the other. Now, how far in yards would you say it was to Wilsonia from that same point?

A. Well, not over 200 yards, I don't believe.

Q. That would be 600 feet?

A. Yes, sir.

Q. Now, what is the distance in your judgment between Oswego station and Wilsonia?

A. 1300 feet.

Q. Well, now then, if it is 1300 feet between Oswego and Wilsonia station, it must be farther from Oswego down to this culvert than you stated—three or four hundred feet—or else it is farther from the culvert down to Wilsonia than three or four hundred yards, than 300 yards I think you said—300 yards. Would that be about right?

A. I didn't understand just what you said then.

Q. Did you say it was 300 yards from this culvert down to Wilsonia?

A. Why, I said 200 yards.

Q. Then that is 600 feet.

A. From what I should judge.

Q. Now then, the other distance, the other way to Oswego, is how many feet?

(Testimony of Thomas J. Evans.)

A. It is about 700 feet.

Q. 700. That will make the 1300.

A. Yes, sir.

Q. You said awhile ago it was three or four hundred feet.

A. I don't know exactly them measurements from that bridge. I am not very well acquainted with that side of the track.

Q. Give us your best judgment. Is it 700 feet, in your judgment, from that little culvert back to the Oswego station? That is about what you think it is.

A. Yes, sir.

Q. And about 600 feet from there to Wilsonia station?

A. Yes, sir something like that.

Q. Now then, this little culvert has a path that leads up to it from the east side, coming up the hill, hasn't it?

A. Coming up the hill toward the track?

Q. Yes, that you walked up?

A. Yes, sir.

Q. Is that a foot path, or a wagon road, or what is it?

A. It is a foot path.

Q. Where does it come from?

A. It comes from the foundry there.

Q. Now, isn't this true, Mr. Evans, that that foot path is one that was used when the Oswego Iron

(Testimony of Thomas J. Evans.)

Works were in operation, years and years ago, and used by them to come up to that right of way, and then get from there to Oswego station, long before there was any Wilsonia?

A. Well, I don't know. I was never down in there before.

Q. Don't you know that it was put in there by these people themselves for their own convenience to get onto the right of way, to go up to Oswego, and that you simply went up the hill, you both went up the hill onto the right of way, and got between the rails intending to go to Oswego?

A. No, sir. I intended to go to Wilsonia.

Q. But you were going to take the train at Oswego weren't you?

A. No, sir, not when I come up on the track, I didn't intend to.

Q. Well, but before you got in sight of the cars, before you got over the hill, up onto the right of way, you expected to go to Oswego, didn't you, to get your train?

A. Before ever I seen the train at Wilsonia, I did.

Q. Yes, before you saw the train which you thought was at Wilsonia, you were started for Oswego station, weren't you?

A. We seen it before we started.

Q. I know you saw it, but before you saw the

(Testimony of Thomas J. Evans.)

train it was in your mind—before you got to the right of way, before you got up the hill, you were started to Oswego, weren't you?

A. We seen the train when we was down by the barn.

Q. How far away?

A. Well, I don't know just how far it is from the barn to Wilsonia.

Q. Well now, just about how far?

A. I should judge about one-eighth of a mile.

Q. About an eighth of a mile?

A. I don't think it is over that.

Q. That would be between six and seven hundred feet wouldn't it?

A. Yes, sir, something—I believe it was a little further than that.

Q. Well, was it as much as 300 yards, do you think, from the barn up to Wilsonia?

A. From the barn to Wilsonia?

Q. Yes.

A. Something like that.

Q. Now, when you were at the barn intending to get ready to start to Portland, you saw the train at Wilsonia?

A. Yes, sir.

Q. What was it doing?

A. Standing there.

Q. Standing still?

(Testimony of Thomas J. Evans.)

A. Yes, sir.

Q. You knew it was at Wilsonia?

A. Yes, sir.

Q. And you knew that before you left the barn?

A. Yes, sir.

Q. Now, what did you see that made you know it was there?

A. Well, we could see the side lights in the coaches.

Q. There was no hill, or trees, or anything to obstruct your view?

A. No, sir.

Q. You saw it there at Wilsonia, standing still?

A. Yes, sir.

Q. While you were walking from that point all the way up?

A. No, sir. We seen it there, and went right on up the hill.

Q. Now, let me ask you this question, Mr. Evans: From the time you left the barn and walked in that path up to that right of way, could you see the train all the time?

A. No, sir.

Q. What kept you from seeing it?

A. Well, it is on the side hill there, and we never paid much attention to it. We was trying to get up there on the track.

Q. Now, what was there to prevent you from see-

(Testimony of Thomas J. Evans.)

ing the train at Wilsonia station just the same as you saw it from this barn?

A. Well, the further you went up the hill, you couldn't see the side lights.

Q. What obstructed your view?

A. Why, when we got up even with the end of it, you couldn't see the side lights.

Q. But you could see the train couldn't you?

A. No, sir, it was dark.

Q. But you had seen it?

A. Yes, sir.

Q. And knew it was there?

A. Yes, sir. I knew it was there.

Q. And you couldn't see the body of the train when you got past where you could see the side lights?

A. No, we couldn't see the train after we got by, no, sir.

Q. Well, you saw that train when you walked a distance of about 600 feet, until you got past the side of the car, didn't you?

A. Yes, we could see it.

Q. And you could see it all the way until you got near the end, behind it?

A. Yes, sir. When we got behind it we couldn't see it.

Q. And the thing that made you see it was the side lights on the coach?

A. Yes.

(Testimony of Thomas J. Evans.)

Q. And you saw that until you got between the rails?

A. Yes, sir.

Q. From the time you left the barn until you got between the rails, that train was in your eye all the time?

A. No, I wouldn't swear it was in my eye all the time I was going along.

Q. Well, you could see it if you had looked?

A. Well, maybe I could.

Q. Well, is that the fact?

A. No, I don't believe a fellow could, going along there, see it all the time.

Q. Most of the time you could see it?

A. No, sir. It is trees along there.

Q. Well now, Mr. Evans, when you got over into the right of way, you got into a little cut, didn't you?

A. Yes, sir, at that time.

Q. There was quite a ridge on the east side of that track, isn't there, at that point?

A. Yes, sir.

Q. How high is that ridge youd you say, above the level of the rails? As high as a man?

A. You mean?

Q. On the east side, as you came up the hill, isn't there quite a raise there, embankment, thrown off to one side?

A. Yes, sir, it is quite—

(Testimony of Thomas J. Evans.)

Q. You had to come down onto the grade between the rails, didn't you?

A. No, it is a side—tips right off from the side.

Q. The bank slopes down?

A. Not from the track. It slopes from the bank.

Q. Well then, you climbed up, didn't you?

A. Yes, sir.

Q. And when you got up there, when you got up to the point at the top of this grade, how far were you from the rails down there?

A. The rails below?

Q. Yes.

A. We come up on the rails. We wasn't above the rails at all.

Q. Is it lower—all the ground lower on the east side than the track itself?

A. Yes, sir.

Q. There is no embankment on the east side there at all?

A. No, sir.

Q. Perfectly level, or rather inclines down the hill—is that it?

A. It was, right along there where it hit me.

Q. But when you went up and went onto the track, did you climb up an embankment, or did you go down an embankment to get to the track?

A. Well, it was up hill to the track, if I remember right, right along.

(Testimony of Thomas J. Evans.)

Q. Well, when you first got up on top, did you see the train?

A. No, sir.

Q. How far away were you from the track when you undertook to look? Did you look after you got up there within a distance, I mean, close to the track, did you look to see where your train was that you had seen all the time?

A. Why, it was standing still; the last time I ever seen that train it was standing still.

Q. Well now, did you run up the hill?

A. Yes, sir, we run up the hill.

Q. And did you run across this little culvert?

A. Yes, sir.

Q. And did you turn and run straight towards Portland?

A. No, sir, we was pretty well petered out when we got on top.

Q. Yes, you were tired?

A. Yes.

Q. But you did run up the hill, and run on the track between the rails?

A. Not all the way up the hill.

Q. You were running when you got onto the rails, weren't you?

A. No, sir.

Q. You still saw the train when you got between the rails, didn't you?

(Testimony of Thomas J. Evans.)

A. No, sir, we never seen it.

Q. Couldn't see it?

A. No, sir.

Q. Well, when did you first see it, now, after you got between the rails, before you were hurt?

A. Before I was hurt?

Q. Yes.

A. I never seen it at all before I was hurt after I got on the track.

Q. Well now, how far was it from where you first entered the track and got between the rails down to where Wilsonia was? About 600 feet you said, didn't you?

A. Where we got on the track?

Q. Yes.

A. No, sir, I didn't.

Q. How far did you say?

A. I should judge it was about, from where that trail comes on the track, about 800 feet.

Q. To Wilsonia?

A. Yes, sir.

Q. Well now, how far had you gone from where you got on the track between the rails after you crossed this little culvert, how far had you gone towards the train before it struck you?

A. Why, I couldn't say, but we hadn't gone very far before it struck.

Q. Well, about how far?

(Testimony of Thomas J. Evans.)

A. Well, that I couldn't say.

Q. A hundred yards, do you think?

A. No, sir, I don't think we went that far.

Q. One hundred feet?

A. Something like that. We hadn't went just a little ways.

Q. Who was ahead, you or the other man?

A. I was.

Q. What was his name?

A. His name was Emmett.

Q. How far ahead of him were you?

A. I should judge about 10 or 15 feet, I suppose.

Q. Did you, either of you, run after you struck the grade?

A. After we got on top?

Q. After you got on the track.

A. Why, we were trotting along part of the time.

Q. That is, you trotted towards what you thought was Wilsonia?

A. Yes, sir. We wasn't running.

Q. I know, but what was the reason you were trotting?

A. Why, we wanted to get the train to go to Portland.

Q. Don't you know that it was your impression that that train was just pulling out from Wilsonia, and you were trying to catch it?

A. Pulling out to go to Portland?

(Testimony of Thomas J. Evans.)

Q. Yes.

A. No sir, it was not. It was standing still.

Q. I say, wasn't that your idea at the time?

A. No, sir, it was not.

Q. You thought it was just leaving, and you could run and catch it—now, isn't that the fact?

A. No, sir, that is not a fact.

Q. You thought it was standing there?

A. Yes, sir, I did.

Q. And you didn't see the train approach you at all?

A. No, sir, or I wouldn't let it hit me.

Q. You didn't hear it approach you?

A. No, sir.

Q. And you didn't hear your companion call to you to look out for the train?

A. No, sir.

Q. You didn't hear the conductor or anybody else call from the train to look out for it?

A. No, sir, I did not.

Q. You didn't see it coming back?

A. No, sir, I did not.

Q. And yet you are willing to swear to this jury that you looked, you didn't see any brakeman or anybody else on the rear of that train, or any light there?

A. It was none there.

Q. How do you know, if you couldn't see the train, and didn't see it?

(Testimony of Thomas J. Evans.)

A. Well, because it just knocked me off the side.

Q. I know, but if you looked and couldn't see the train, and couldn't hear it, and didn't know it was there, how could you say whether there was a brakeman or a light on the rear of that train?

A. There was no light there or a man could see it.

Q. You said there was no conductor, no brakeman, or no man there.

A. I couldn't say there was any there—never seen any.

Q. You say there was no one there, but you mean to say you didn't see anybody?

A. I didn't see nothing at all.

Q. As a matter of fact, did you look?

A. Yes, I had my head up like any man would.

Q. Where did this train strike you in the face?

A. Right in the nose, right there.

Q. Did it do any damage?

A. It skinned it, yes, sir.

Q. Any scar there now?

A. I don't believe so.

Q. Did it bleed?

A. Yes, sir, it did.

Q. Just a little scratch on your nose? Didn't knock you down, did it?

A. Yes, sir, it knocked me down.

Q. The blow was sufficient, when it struck you in the face, to knock you down?

(Testimony of Thomas J. Evans.)

A. Yes; knocked me in the breast, too.

Q. Did it strike you here?

A. I wouldn't swear that all that done it, but it hit me right on the breast.

Q. Did it break the skin on your breast?

A. No, sir.

Q. Did it leave a black place on your breast?

A. Not that I remember of.

Q. Don't you know there was not a mark on your person excepting on this foot?

A. I couldn't swear to that, because what does a man know for a few days?

Q. Well, were you unconscious by the blow?

A. No, sir, it never knocked me unconscious.

Q. Now, as a matter of fact, Mr. Evans, when you were lying there at the foot of the bank, didn't you have a conversation in the presence of Mr. F. S. Craw, the engineer, and the fireman, H. N. Mooney, as to who was to blame for your misfortune?

A. No, sir, I don't remember nothing of it.

Q. Well, did you, or did you not, see those men there?

A. I couldn't swear to seeing—the only man I could swear to seeing there was Mr. Ellston.

Q. A bystander, or a passenger?

A. Why, he was a passenger. I couldn't swear what he was.

Q. Where was he?

(Testimony of Thomas J. Evans.)

A. He come down to me, the first man come down to me.

Q. Well, sometime during that evening, after you had been run over and while you were there, these men by you—I don't know if any one else was present—didn't you say, in substance, in their presence, and to them, "Well, boys, you are not to blame. I am the one to blame myself," or words to that effect?

A. No, sir, I never did, no, sir.

Q. You did not?

A. No, sir. Never thought of blame or anything like that.

Q. Didn't you say, in these words, "Boys, it is my own damn fault?"

A. No, sir, I never did.

Q. Now, while you were going to Portland, and in the car, did you have a conversation with conductor L. D. Keyzer and a Mr. Coon, a passenger, you and they being present, in which you repeated substantially the same conversation, but not using any profanity?

A. No, sir. Mr. Ellston and Pete Emmett were the only men that I ever remember talking to.

Q. If you had any such conversation, you don't recollect it?

A. No, sir. I never had it.

Q. Now, Mr. Evans, you say that you crossed on to this right of way from the east, across that little

(Testimony of Thomas J. Evans.)

old culvert, that had a path that led up to it, about 700 feet south of Wilsonia, and that when you left the barn, you saw the train and thought it was at Wilsonia, and started to catch the train there. Did you know what time in the evening it was when you left the barn?

A. No, sir, the time I couldn't swear to, because I didn't have a watch.

Q. But you knew what time that train had to return, didn't you?

A. To Portland?

Q. Yes.

A. 10:45.

Q. You knew that it started from Oswego at 10:45, didn't you?

A. Yes.

Q. And you knew that it didn't stop but a moment at Wilsonia if it was on its way to Portland, didn't you?

A. Why, it stopped long enough to leave off passengers.

Q. And to take on passengers?

A. Yes, sir.

Q. But that is just a moment, isn't it?

A. Well, that is according how many passengers they had.

Q. And when you left the barn, you started to take the train, as you say, at Wilsonia, and you got onto

(Testimony of Thomas J. Evans.)

the track, and the train was still standing so far as you know?

A. Yes, sir.

Q. And you couldn't see the side lights, but you knew the train was there, and you never saw it and you never heard it until it ran the 700 feet? Now, is that true?

A. Yes, sir, I never heard it nor saw it, or I would have got off the track. . .

Q. Now, what were you doing?

A. I was going down the track.

Q. What did you have in your hands—anything?

A. Never had a thing.

Q. You had good eyesight, didn't you?

A. Yes, sir, I had.

Q. You had good hearing?

A. Yes, sir, I had.

Q. And you were an active young man?

A. Yes, sir, I was.

Q. And you ran part of that distance on the track?

A. No, sir, we never ran, after we got on the track. We went on a little trot, not to say run.

Q. Well, you made a turkey trot, as you say, on the track?

A. Yes, sir; but I was not running when that train hit me.

Q. I know, you stopped just before the train hit you, just into a walk. I understand that.

(Testimony of Thomas J. Evans.)

A. No I didn't stop just before it hit me. We walked a ways before it hit me, but how far I wouldn't say.

Q. Did the other man—what is his name?

A. Emmett.

Q. Did he trot or run?

A. He was behind me.

Q. Did he have anything in his hand?

A. Nothing at all that I know of.

Q. Neither of you had anything to carry?

A. No, sir.

Q. And you had your coat and working clothes on, just as you are now?

A. No, sir, I did not. I had my good clothes on.

Q. What?

A. No, sir, I did not have my working clothes on.

Q. You were visiting and going coon hunting that night?

A. Yes.

Q. You came up the day before, did you?

A. No, sir, I did not.

Q. You came up that day, and were going coon hunting. Where were you going?

A. I came up there to visit my friend, and they wanted me to go coon hunting, and I went coon hunting, but I didn't go up to go coon hunting.

Q. Well, you went coon hunting?

A. Yes, sir.

(Testimony of Thomas J. Evans.)

Q. Who went with you?

A. There was Pete Emmett and two or three Worthington boys, and a couple of boys by the name of Johnson.

Q. What time did you come back from the coon hunting to the barn?

A. The time I couldn't swear; I didn't have no watch.

Q. Did you have supper?

A. Yes, we had supper before we went.

Q. You didn't go out until after supper?

A. No, sir.

Q. You are not a drinking man at all, are you?

A. No, sir, I am not.

Q. You hadn't anything at all? ..

A. No, sir.

Q. None of the party had?

A. No, sir.

Q. Well, now, in your complaint here, Mr. Evans, I understand it to read this way: "That in order to reach Wilsonia station, it became convenient for the plaintiff to travel thence, and he then and there undertook to go by means of an open and commonly used trail from the county road to the defendant's unfenced right of way, across a foot bridge then and there being situated at a bridge which spanned a ditch on the westerly side of and wholly within defendant's right of way." Now you are mistaken

(Testimony of Thomas J. Evans.)

about that, aren't you? That foot bridge was on the east side?

A. Well, it was on the side toward the river.

Q. Well now, that trail or footpath went from the barn and went from the Oswego Iron Works, and didn't go from any county road, did it?

A. It went—it is a road coming up there.

Q. I know, but there is no county road that connects with that?

A. I don't know if it is a county road or not.

Q. Don't you know the county road you had in mind is on the west side of the track, between Oswego and Wilsonia, and just outside of the right of way?

A. Yes, sir.

Q. Then this is a mistake in the complaint here, where it says that a path spanned a ditch on the west-erly side of the tracks? It is the easterly side.

Mr. LATOURETTE.—If the Court please, counsel is technical about that question. I would like to amend that by making it easterly.

COURT.—You may amend your complaint, if you desire.

Q. I show you a photograph, which, for the purpose of identification, may be marked Defendant's Exhibit 1, and will ask if you recognize that as a fairly good picture of the track looking towards Wilsonia, at about the point where you got onto that right of way; that is, looking north towards Wilsonia sta-

(Testimony of Thomas J. Evans.)

tion, and the man in the picture standing about where you say the accident happened.

A. Yes.

Q. That is a fairly good picture of the situation as it was at that time, isn't it?

A. No, sir, not to my estimation, I don't believe it was. It seems as though it was a bank on this side of the road, and it was no bank there at all. When I went off the track, I rolled down there 15 feet, when it knocked me off the track.

Q. Which side?

A. Right here where this man is standing.

Q. Well, you see a little sign there, don't you, away down in the distance. That is Wilsonia, isn't it?

A. Yes, sir. You see where this man is standing here?

Q. Yes.

A. That looks like he is standing in a cut, don't it, from that picture? Don't it look like it is a cut in here in the track?

Mr. DEY.—The cut ends right there. The cut ends about here.

Q. You recognize this as the track up towards Oswego, about 700 feet from Wilsonia?

A. Yes, this is the track. I believe that is the track. It is no cut. You have got this picture fixed up like it is a cut down here, haven't you?

(Testimony of Thomas J. Evans.)

Q. I didn't fix up any picture.

A. Whoever did, made a mistake.

Q. The camera speaks for itself.

A. This right down here, the track is right on the edge of the bank. I rolled down here, where this looks like a cut, 15 feet right off the track.

Q. But otherwise than that, it is a good picture of the track and general situation?

A. Yes, it is a fair picture.

Q. The only difference is that you don't think—

A. I think you made it a little bit too big down at that end.

Q. That is, you think we changed the camera, when it got by there?

A. No, sir, I think it looks awful big.

Mr. FENTON.—Otherwise it is all right? I offer that.

Mr. LATOURETTE.—Well, I don't like to make any objection, your Honor, but I should think this ought to be authenticated in some way by the party who took it. I don't think it is properly proved.

COURT.—I do not think the witness has recognized the surroundings sufficiently to offer that.

Mr. FENTON.—Very well, your Honor. We will call the man who took it.

Redirect Examination.

Q. You say that you were not unconscious after you were struck?

(Testimony of Thomas J. Evans.)

A. Not till they took me to the hospital, I was not. I had my senses as good as I have right now.

Q. And did you lose your senses at all while you were in the hospital?

A. Well, not till they chloroformed me, no.

Q. That was when the operation was had?

A. Yes, sir.

Q. Then who did you say was there present on the ground the first you know of?

A. The first man to me was Mr. Ellston, and Pete Emmett come next.

Q. Who is Mr. Ellston?

A. He is a man that lives at Oswego.

Q. Is he here present?

A. Yes, sir, he is.

Q. And when you were struck by the end of this train, how far did it throw you?

A. Why, I couldn't say just how far it threw me. But it threw me quite a ways I know.

Q. You spoke about rolling down. I want you to explain what you meant by rolling down.

A. Well, it is a bank right at the side of the track there.

Q. What?

A. There is a bank right at the side of the track there. And I had hold of the edge of the ties trying to pull myself up, and when—I suppose when the wheel went off my leg, it let me go, and I rolled right down that bank. I was just trying to explain.

(Testimony of Thomas J. Evans.)

Q. How far did you roll down?

A. Why, it must have been 10 feet down on the bank. I was trying to explain that that picture—that it wasn't no cut right there.

Q. There is no bank there where you were struck?

A. No, sir, there is no bank up on each side of the track at all.

Q. Now, which side did you roll to, the east side or the west side?

A. Why, the directions—I rolled toward the river, on that side.

Q. That would be towards the east side.

A. The east side—well the east side.

Recross Examination.

Q. I will just ask you one question, Mr. Evans—what was it stopped the train, do you know?

A. No, sir, I couldn't say what stopped the train.

(Witness excused.)

PETER JAMES EMMETT, a witness called on behalf of the plaintiff being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

What is your full name?

A. Peter James Emmett.

Q. How old are you, Mr. Emmett?

A. I will be 20 years old the 30th of July.

Q. Where do you live?

(Testimony of Peter James Emmett.)

A. I am staying at Oswego now.

Q. What is your occupation?

A. I have been driving team there for about a year and a half, till a few days ago.

Q. Whom have you been working for?

A. The Oregon Iron & Steel Company.

Q. Driving team for them for a year and a half?

A. Yes, sir.

Q. Are you still working for them?

A. No, I quit.

Q. When did you quit?

A. Three weeks ago.

Q. Now, are you pretty well acquainted up there around Oswego and Wilsonia?

A. Fairly good, yes.

Q. Do you know where the railroad runs between those two points?

A. Yes, sir.

Q. What is the character of that country in through there?

A. Oh, it aint very level. It is a little hilly in there.

Q. Hilly?

A. A little bit; not bad.

Q. Well, is it timberland?

A. Yes, there is some brush.

Q. Some brush?

A. Yes.

Q. Are there any trees?

(Testimony of Peter James Emmett.)

A. A few small fir growth.

Q. It has been cut over, has it?

A. No big trees.

Q. Have you been over that road, right of way, between the two places pretty often?

A. Oh, a few times. Coming down to Portland I would come over there, of course.

Q. How long have you lived up there?

A. Well, I have been around there about two years; not quite two years.

Q. Now, in driving team, where would you keep your horses?

A. Kept them down at the foundry.

Q. At that barn?

A. At the barn where we was at.

Q. That the plaintiff spoke about in his testimony?

A. Yes, sir.

Q. That is where you kept your horses, was it?

A. Yes.

Q. Now, how far was that from Wilsonia, that barn?

A. Oh, it wasn't quite a quarter of a mile.

Q. How far was it from the barn to Oswego station?

A. Well, there wouldn't be much difference—a little bit—to cut corner-ways with it, there wouldn't be a great deal. A little further to Wilsonia to go around the lower way.

(Testimony of Peter James Emmett.)

Q. Now, Mr. Emmett, you know young Evans, do you?

A. Yes, sir.

Q. The plaintiff here. And was he at your place about the 25th of September, 1909.

A. He was out there to Oswego, yes.

Q. And just tell the court what time he got there, and what you did that evening.

A. Well, he came up where I was staying, and we got our supper and went coon hunting; come back, and he was going to take the train to Portland, and he got run over. That is all.

Q. Now, who went out on that coon hunt with you?

A. Well, there was myself and him and Millie Worthington, Ollie Worthington and Howard Worthington, and a couple more small boys.

Q. When was it, about what time was it, that you left the barn with him to go to the station that evening?

A. Oh, about half past ten—10:35—somewhere along there.

Q. Did you have a watch?

A. No, I didn't have no watch.

Q. Just had to guess?

A. Just had to guess about that time.

Q. Now, in going from the barn to Wilsonia station, which way did you go?

(Testimony of Peter James Emmett.)

A. Went right up past the old pump house, and up that walk.

Q. To what point?

A. To the railroad track there just below the depot.

Q. And then which way from there?

A. Went down the track.

Q. Well, which direction would that be?

A. North.

Q. Now, you say by that path. What path do you refer to?

A. The path that all the foundry boys goes to work on, the trail that runs down to the foundry.

Mr. FENTON.—I did not understand that last.

A. The trail that all the working men went to the foundry on.

Q. Was that a well-defined path?

A. Well, everybody traveled it, all the boys that worked down there. There's two trails right there, close together—some traveled one and some the other.

Q. You mean traveled it going from their work to their homes?

A. From their work to their homes.

Q. Now, which direction was the foundry from the railroad track?

A. East.

Q. And about how many men were working there in the foundry?

(Testimony of Peter James Emmett.)

A. At that time?

Q. Well, during any regular—any time—average number.

A. 50 or 60. I don't think there was any working there at that time, only me and a few more, several around there. I think the shop was closed.

Q. How many before and since that time?

A. Since? Oh 50 or 60 men.

Q. And how long had that trail been there to your own knowledge?

A. Been there ever since I have been in Oswego.

Q. And these men in traveling up that trail to go to their homes, which way would they go when they got to the track?

A. Crossed the track and went right up through town.

Q. Would some of them go down the track? And some up the track?

A. Some of them might go up the track. I don't know as any of them were going down.

Q. Was that right of way fenced at all between Oswego and Wilsonia?

A. There was only one fence along it, and that was the Oregon Iron & Steel Company pasture fence.

Q. The railroad company right of way was not fenced?

A. No, it was not fenced.

Q. Any of the distance?

A. No.

(Testimony of Peter James Emmett.)

Q. This fence that you refer to—

A. Was the Oregon Iron & Steel Company's.

Q. Was a fence belonging to some of the Iron Company's lands?

A. Yes, sir.

Q. Which direction was that running?

A. That run the same as the railroad, north and south.

Mr. FENTON.—Parallel with the right of way.

A. Parallel.

Q. On which side of the railroad track.

A. On the east side.

Q. Well, for what distance? Where was that located?

A. Well, it ran from Wilsonia, or a little the other side of Wilsonia, oh, about half way up, and then it went down on the lower side a little ways further.

Q. Down towards the river?

A. Yes.

Q. How far was that from the railroad track?

A. Well, I don't know just how far. It was not very far in some places.

Q. That was built by the Iron Company?

A. Sir.

Q. That was built by the Iron Company for their pasture, was it?

A. Yes, sir.

Q. That had no reference to the railroad right of way?

(Testimony of Peter James Emmett.)

A. As far as I know, it had not.

Q. Was there any fence on the other side of the railroad?

A. No, sir.

Q. Now, you think it was about 10:30 or 10:35 that you and Mr. Evans started to go up to take the train?

A. About 10:30.

Q. And could you see any train before you got up to the railroad track?

A. Well, I heard it switching.

Q. You heard it whistle?

A. I heard it switching.

Q. Where was it then?

A. At Wilsonia.

Q. At Wilsonia station?

A. Yes, sir.

Q. And could you see some side lights down there on the train?

A. I don't know as I looked up to see any. I heard it, and I knew that it was there.

Q. Well, just describe to the jury now, what you did, and more particularly what Evans did from the time that he got onto the track, and what occurred. Tell the jury what happened.

A. Well, when he got onto the track he just went right down the track coming up from the foundry. We had been running, we was pretty tired, and just

(Testimony of Peter James Emmett.)

poking down the track, like a man would when he was tired; not thinking of the train backing up; thought it would be starting out the other way, and he just ran right into it—kind of trotted into it, as it was. I was a little behind him. He was a little better runner than I was—he was a little ahead of me.

Mr. FENTON.—That is, Evans trotted into it?

A. Yes, sir.

JUROR.—Were you between the rails?

A. Yes, sir.

Q. Well now sir, what was the first thing you noticed?

A. The first thing I noticed?

Q. Yes, in regard to the train after you had got on the track.

A. When I got on the track?

Q. After you got on the track.

A. After I got on the track?

Q. Yes, when he was struck.

A. When he was struck. There was a man came to the door with a lantern just as the train struck him, and hallooed "Look out, look out."

Q. Just as the train struck him?

A. Just as the train struck him.

Q. Where did this man come from?

A. Just came right out of the coach.

Q. Out of what part of the coach?

A. The rear end, right out the door.

(Testimony of Peter James Emmett.)

Q. The end you mean, towards you?

A. Yes, sir.

Q. Towards Evans? Well now, which happened first—did the train strike Evans first, or did the man come out of the coach first?

A. There wasn't but very little difference. You could hardly tell.

Q. Just tell the jury what you saw about that just as near as you can.

A. Well, just about the time the train struck the boy, the man come to the door with a lantern, and he hallooed "Look out," and it just knocked the boy down, and it ran over his leg. And I crawled down to see where he went to. I never expected to see him alive.

JUROR.—How far were you from the train then?

A. About eight or ten feet.

Q. Do you know who that was that had the lantern?

A. Well, I suppose it was the conductor.

Q. Did you see anything of the brakeman?

A. No, sir.

Q. Well now, up to the time that that man came out of the rear door with the lantern, up to that time was there any light on the rear of that train?

A. No, sir.

Q. You swear to it?

A. There was no light.

(Testimony of Peter James Emmett.)

Q. Was there any other look-out?

A. All the light you could see was what was shining through the glass. We would have to look up to see the light shining through the glass of the door.

Mr. FENTON.—Through what?

A. He would have to look up to see the light shining through the glass of the door.

Mr. FENTON.—Through the panel of the door?

A. Yes, sir.

Q. You saw that afterwards, did you?

A. Just as the door opened I could see, when the train was coming, and it didn't any more than give me time to get off.

Q. Were you looking all the time as you were coming down there to see if there was any train coming, or in the way?

A. I don't know as I would have seen it if the door hadn't opened, myself.

Q. Was it pretty dark?

A. Fairly dark, yes.

Q. Now, was there any whistle or any bell rung there right before that accident?

A. Well, I didn't hear any myself.

Q. Well, were you in a position where you would have heard if it had been sounded?

A. I expect I would.

Q. Was there any signal of any kind given so as to warn Evans or yourself of the backing of that train?

(Testimony of Peter James Emmett.)

A. Not that I know of.

Q. Any noise of the train running, or anything that you could hear?

A. Of course the train would make a little noise.

Q. Did you hear any noise?

A. I wasn't paying any attention to the noise particularly. I was expecting it was going the other way, and would start from Wilsonia.

Q. Was the wind blowing, do you know, that night?

A. No, I don't know.

Q. You say you and Evans had been running pretty fast?

A. Yes, sir.

Q. Now, after the train struck him, just describe to the jury what condition he was in, as far as you could see.

A. After the train struck him?

Q. Yes.

A. Well, when the train struck him, he kind of glanced over, and I suppose that when he glanced, this leg must have stuck across the rail, and whenever the train run over that leg, he just rolled on down.

JUROR.—Did it take the leg clear off?

A. No, sir. It just left it hanging. It was not clear off.

Q. How many wheels of the coach ran over him?

(Testimony of Peter James Emmett.)

A. Well, that is what I don't know. I don't know whether one or two. I don't suppose only one did. Maybe two.

Q. You got out of the way all right, did you?

A. Yes, sir.

Q. How far did the train run after it struck him?

A. About the length of a coach.

Q. About the length of one coach? And what stopped the train, do you know?

A. Well, the man that come to the door pulled the string just after it struck him.

Q. What?

A. The man who come to the door pulled the string.

Q. Did you see that man around there afterwards that pulled the string?

A. He certainly was there some place.

Q. Are you satisfied who it was?

A. Well, pretty, yes.

Q. Do you know him?

A. Well, I suppose I do.

Q. Who was he?

A. I think it was Mr. Keyzer that come to the door.

Q. That would be the conductor on the train at that time?

A. Yes.

Q. Now, who else did you see there with Evans when he was picked up?

(Testimony of Peter James Emmett.)

A. Oh, there were several around there. Everybody was kind of excited after the accident happened.

Q. Do you know Mr. Ellston?

A. He was there, yes, sir.

Q. What?

A. Yes, sir, Mr. Ellston was there.

Q. You know him? Was he there?

A. Yes, sir.

Q. And who else?

A. Mr. Archie Worthington.

Q. Archie Worthington?

A. Yes, sir.

Q. Where was Archie Worthington at the time of the accident?

A. He was in the coach.

Q. Who picked Evans up? Who was around there with Evans and helped?

A. Well, Mr. Ellston tied up his leg, and several of us carried him out.

Q. What did they do with Evans after that?

A. Put him in the coach and took him up to Oswego, and then brought him back to town.

Q. Did you go down with him to the hospital?

A. Yes, sir.

Q. And who else went with him?

A. Mr. Ellston.

Q. Were you with him all the time then until they got him to the hospital?

(Testimony of Peter James Emmett.)

A. Yes, sir.

Q. Now, sir, did you ever hear him say to the conductor, or to any one, that it was his own fault?

A. Well, I don't know as he did. I was excited. I wouldn't know what he said.

COURT.—I think that would be rebuttal, Mr. Latourette.

Mr. LATOURETTE.—Yes, I suppose it would, your Honor.

Q. You stayed right with him until he got to the hospital?

A. Yes, sir.

Q. And Mr. Ellston stayed with him?

A. Yes, sir.

.. .Q You were both of you neighbors there at Oswego, and friends?

A. Yes, sir.

Q. Did you see any blood around there?

A. Yes, sir.

Q. Just state to the jury how badly he bled from that.

A. Well, he bled all over everything. The cot we laid him on was just nothing but blood; the clothes was all blood. There was blood on the track,—you could see it on the rail.

Q. How did they bind up the limb?

A. Just tied a piece of rope, or whatever they had, just above the knee, as tight as they could tie it.

(Testimony of Peter James Emmett.)

Q. Was the lower part of the limb still hanging when they took him to the hospital?

A. Yes, sir.

Cross Examination.

(Questions by Mr. FENTON.)

Mr. Emmett, how far do you say that barn was down the hill from the place where this path led on to the track?

A. How far from the railroad track, you mean?

Q. Yes, from the place where you got onto the track across this little bridge or culvert?

A. Oh, it aint quite a quarter of a mile, I don't suppose.

Q. It is about the same distance, as I understood you, from the barn by way of that path to Oswego, as it was from the barn by way of that path to Wilsonia?

A. No, there is two paths. One runs from each depot to that foundry.

Q. Oh, then, there is a path that leads from this barn, that goes to Wilsonia?

A. Yes.

Q. At that time?

A. Yes, sir.

Q. And then there is another path that goes to Oswego?

A. Yes, sir.

Q. Now, which path did you and Evans take—the one that led to Oswego?

(Testimony of Peter James Emmett.)

A. We took the one that led right up between Oswego and the—

Q. I understand, but that was the path that you would take to go to Oswego.

A. Well, yes.

Q. Now, why was it, Mr. Emmett, that you took that path instead of taking the one that went to Wilsonia?

A. Well, we was on that path, and we would have had to go around back to the foundry to get on the other one, when we was on that one.

Q. In starting out from the barn, I understand you to say there are two ways to get to the track. One is to go to Wilsonia by one path?

A. Yes.

Q. And one to Oswego by another path?

A. Yes, sir.

Q. And you took the path that led to Oswego?

A. Yes, sir.

Q. Well now, why did you take that path instead of the Wilsonia path?

A. Well, we would have had to went around down to the foundry, and didn't think about it at the time.

Q. Isn't this true, Mr. Emmett, that you both thought that you would go to Oswego and get on the train there?

A. Well, when we got up to the track?

Q. I mean when you left the barn?

(Testimony of Peter James Emmett.)

A. When we left the barn.

Q. That was your idea?

A. That was the idea, yes sir.

Q. To go to Oswego?

A. Yes, sir.

Q. Because you knew he had a return ticket from Oswego?

A. Yes, sir.

Q. Were you coming back to Portland?

A. I was coming to Portland, yes, sir.

Q. You hadn't gone out with him?

A. No, sir.

Q. You expected to go to Oswego and buy your ticket, and come in with him?

A. No, sir. They don't stay open.

Q. Well, you expected to get on the train at that point, at Oswego, when you left the barn?

A. When we left the barn.

Q. Now, when was it that you and Mr. Evans changed your mind and concluded to go to Wilsonia instead of to Oswego?

A. When we got up pretty near to the railroad track, going up that little bridge.

Q. When you got almost up to the railroad track, why, you say you had heard it switching, hadn't you?

A. Yes, sir.

Q. And you knew when it was switching that it was down towards Wilsonia, didn't you?

(Testimony of Peter James Emmett.)

A. Yes, sir.

Q. And so did Mr. Evans know it? You talked about it, didn't you?

A. Yes.

Q. And when you got up pretty nearly to the track, you looked, and you saw the side lights in the coach?

No, sir, there was no side lights.

Q. You didn't see any lights at all?

A. No, sir.

Q. Mr. Evans said that he saw the side lights from the time he left the barn.

A. Well, there was lights in the window. There's no lights on the side.

Q. Well, I mean in the window.

A. Oh, in the window.

Q. That is what I mean by side lights. You saw there were side lights, or windows in the coach, and that there was light inside, didn't you?

A. Yes, sir.

Q. And you saw that from the time you left the barn?

A. Couldn't see it all the time. Never looked all the time.

Q. But you did see it before you went down onto the track?

A. Before we went onto the track?

Q. Yes.

(Testimony of Peter James Emmett.)

A. I don't know as we did.

Q. You had heard it switching?

A. We heard the switching.

Q. You knew it was switching down at Wilsonia, didn't you?

A. Yes.

Q. Didn't you think where the train was going?

A. Well, switching down there a person would naturally think it was going to leave from there when it got switched.

Q. Now then, as a matter of fact, both you and Mr. Evans expected, after you got up there and saw that the train was down towards Wilsonia, that you would have to run to catch it there, didn't you?

A. We expected we would have to run and get on it when it left Wilsonia.

Q. You thought that the train had left Oswego and was on its way to Portland, didn't you?

A. Well, I knew it was there.

Q. Well now, isn't it true you both thought the train had left Oswego and gone to Portland—started on to Portland?

Mr. LATOURETTE.—We object to what Mr. Evans thought, unless Mr. Evans stated to him what his opinion was.

COURT.—The two were together.

Q. Wasn't that the reason why you changed your course and didn't go up to Oswego, as you intended

(Testimony of Peter James Emmett.)

originally, and concluded to go the other way to Wilsonia, because you thought, both of you, that it had started on to Portland; had already been to Oswego, and was going back? Now, isn't that the fact?

A. What would be the difference if we got on at Oswego?

Q. Answer the question. Isn't that the fact?

A. We expected to get on there when it left Wilsonia, of course.

Q. I know, but you intended originally to go to Oswego; but when you got up there you saw it was down at the other place, and you thought it was going to go on; it had been to Oswego, you thought, and you wanted to catch it, didn't you?

A. Of course we wanted to catch it.

Q. Didn't you start to run to catch that train?

A. We had been running. He was ahead of me. He was a better runner than I was.

Q. You had heard it switching at Wilsonia before you got in sight of it?

A. Yes, sir.

Q. You supposed it had been at Oswego, and you would have to hurry to catch it?

A. We had to hurry, yes.

Q. You intended to catch the train? You thought it had already started?

A. It hadn't coupled up yet when we started to run down the track.

(Testimony of Peter James Emmett.)

Q. Well now, when you saw the train, saw the side lights, and you were up on top there, and was going to step down onto the track, do you want to tell this jury that you walked there deliberately, with no idea of any hurry; that the train would wait for you, and that you would get on at Wilsonia; but didn't you hurry to get the train?

A. We hurried all we could, yes, sir.

Q. Didn't Mr. Evans hurry all he could?

A. I suppose he did.

Q. Didn't he outrun you, and wasn't he about 10 or 15 feet ahead of you when he was struck?

A. He was eight or ten feet ahead of me, yes, sir.

Q. You were both running at the time?

A. I don't know as he was running so fast. He was doing all he could to get there.

Q. And he was running?

A. I don't know as he was running.

Q. Weren't you running?

A. I was doing all I could.

Q. What was that? Running or walking?

A. You could call it running or trotting.

Q. I am not calling it. Was it running or what?

A. It was trotting as fast as a man could when he was out of wind.

Q. You had hurried from the time you first got up on top there, you hurried as fast as you could in the condition you both were, to get that train, supposing it was making its way to Portland?

(Testimony of Peter James Emmett.)

A. Yes, sir.

Q. And you had no idea that it was going back to Oswego?

A. If I did, I wouldn't have went down there.

Q. Certainly. And neither one of you looked to see whether it was going to back?

A. Well—

Q. Now, isn't that true?

A. I wasn't watching the train. I was getting down there.

Q. Yes, you were not watching the train—you were trying to catch it?

A. I was trying to get down there, yes.

Q. How far was it from you when you got down on that track and started to run or trot down towards Wilsonia, between th rails—was it down to Wilsonia?

A. How far?

Q. Yes.

A. Oh, about 800 feet, eight or nine hundred feet.

Q. And you intended to run all the way between the rails down to Wilsonia, 800 feet, to catch that train, did you?

A. Well, if we had time to run before it coupled up.

Q. And while you were running, all at once it came the other way?

A. Yes, sir.

Q. And caught this man. Now, didn't you know

(Testimony of Peter James Emmett.)

that that train was down there all the time, both of you?

A. I don't know about him knowing it. I knew it was there.

Q. You could see it when you got onto the track, couldn't you?

A. I never seen it. I knew it was there. I knew it hadn't gone.

Q. Well, did you look to see if it was there?

A. A man going that way wouldn't naturally.

Q. Couldn't you see the lights that were in that coach, through the glass door in the rear?

A. You could see the lights, yes.

Q. Couldn't you see the reflection from the side lights, it being a rather dark night?

A. I didn't notice it.

Q. But you could see it was lighted up to one side. Couldn't you see the reflection of the headlight from the engine?

A. No, sir.

Q. You didn't look to see whether it reflected at all or not, did you?

A. Well, a man looking down the track would naturally be looking.

Q. Now, how fast did that train come towards you gentlemen, when he was struck?

A. It just started up good.

Q. How far—you say it moved about a car length

(Testimony of Peter James Emmett.)

—about how far would that be, after you saw it strike him, in your judgment?

A. The length of the coach—I don't know just what a coach measures.

Q. I mean by your idea, about what would that be in feet? 40 feet?

A. No, I guess a coach will measure more than 40 feet.

Q. Mr. Evans said about 40 feet. Is that your judgment?

A. I don't know what a coach measures. I know just about the length of the coach.

Q. This culvert you speak of, do you know who put that in there?

A. What culvert?

Q. This little crossing you say you crossed over to get onto the rails—this bridge.

A. I suppose the Oregon Iron & Steel Company put it in there for their men to go over.

Q. This fence you speak of along the east side, put in by the Oregon Iron & Steel Company, that leads from beyond Wilsonia up towards Oswego?

A. Yes, sir.

Q. Comes almost up to that little path there, doesn't it, or about to the path? Or does it come beyond it?

A. It don't come to it. I know that. It don't cross that path.

(Testimony of Peter James Emmett.)

Q. And that fence is on the right of way, on the line, on the east side of the right of way, between that and the lands of the Oregon Iron & Steel Company?

A. Well, I suppose it is somewhere near the line.

Q. Yes. And this culvert has been there 15 or 20 years, as far as you know?

A. Well, I don't know how long it has been there.

Q. At the time you were out there the Oswego Iron Works were not in operation, were they?

A. Which?

Q. I say the Oswego Iron Works were not in operation were they—the foundry?

A. The foundry was not running at that time. I was working for the company.

Q. At that time it was not running?

A. At that time.

Q. Counsel asked you about these men that went to their homes, if they came up there and went across this culvert, and went to their homes. They never went down towards Wilsonia between the rails, but went across the track, or up to Oswego, didn't they?

A. Yes, sir.

Q. How many men were employed there at that time?

A. 50 or 60 men. At that time?

Q. Yes.

A. The foundry was not running. There was only a few of us working.

(Testimony of Peter James Emmett.)

Q. How long had it been closed down?

A. It had been closed down since in June some-time, I believe.

Q. Now, I will ask you this question: Did you ever get on a train at Wilsonia in the same way that you were undertaking to get on the train this time?

A. When I lived up in Newton, I went down to Wilsonia sometimes, and got on there.

Q. But you never ran between the rails to overtake a train before, did you?

A. No, sir.

Q. I understood you to say awhile ago, that none of these men that worked there went down that way between the rails to go home, but they went up towards Oswego, or went straight across the track and up the hill?

A. Yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. Now, at the time you saw the train, when you got up there, you thought the train was just pulling out, didn't you, for Portland.

A. I thought it would, yes, sir.

Q. You thought it was just pulling out, and that is the reason you were hurrying?

A. It hadn't started yet, I didn't think.

Q. But you expected you would have to run to catch it?

(Testimony of Peter James Emmett.)

A. To catch it.

Q. How far did you move from where you first got onto the track, or how far did Evans move from where he first got onto the track, between the rails, until he was struck, in feet? About how far down the track had you gone?

A. About how far down the track?

Q. Yes.

A. Not over 200 feet.

Q. Had you trotted all the way those 200 feet?

A. I had.

Q. You had?

A. Yes, sir.

Q. And you didn't catch him?

A. I was just a little ways behind him.

Q. He kept ahead of you about 10 feet?

A. About 10 feet.

Q. Did you notice the train backing up at all before he was struck?

A. Not until he was struck.

Q. Just before he was struck you noticed the train was coming?

A. Just about the time it struck him.

Q. How far away from you was it when you first saw the train approaching?

A. About 10 feet.

Q. You mean you were 10 feet from the rear end?

A. From the rear end.

(Testimony of Peter James Emmett.)

Q. Don't you think you were 20 or 25 feet away?

A. I don't think it was.

Q. Are you certain about that?

A. I know I was not so very far.

Q. Well, weren't you as much as 20 or 25 feet away when you first saw the train coming? I mean, knew it was coming?

A. No, sir, I don't think I was.

Q. Did you call to him to get out of the way?

A. Just about the time it struck him, I called to him.

Q. What did you say?

A. I says: "Look out."

Q. Whom did you speak to?

A. Tom Evans.

Q. What did you call him?

A. I says: "Look out, Tom."

Q. Did you yell?

A. I halloed just about as I said it.

Q. You said, "Look out, Tom?"

A. Yes, sir.

Q. Did you say it that way?

A. I suppose I did.

Q. You thought he was going to be run over, didn't you?

A. Just as the door opened there when I saw it was coming.

Q. When you called to him, you thought he was going to be run over anyway, didn't you?

(Testimony of Peter James Emmett.)

A. Sure, or I wouldn't have hallooed.

Q. Then you said: "Look out, Tom?"

A. Yes.

Q. That is the way you said it? Now, didn't you shout to Evans and say: "Look out?"

A. I told him to look out.

Q. And just as you shouted the man appeared at the door?

A. Yes, sir.

Q. With a lantern?

A. And we both hallooed at about the same time.

Q. That is the man on the car yelled about the same time that you did?

A. Yes, sir.

Q. And notwithstanding that, he was struck. That is all.

Redirect Examination.

Q. I didn't understand exactly about this path. You say that the one leading to Wilsonia, that is, that people would go that way, but you had to go around by the foundry to get that way?

A. Well, the trail ran around back of the foundry.

Q. Back of the foundry? So then for you to go from your barn to Wilsonia, why you went the most direct route, did you?

A. Well, it wouldn't be a great deal of difference.

Q. Well, you can just as well go that way as the other, could you?

(Testimony of Peter James Emmett.)

A. Well, just as a fellow would think about it at the time.

Q. Well, what was the difference in the distance?

A. Oh, there wouldn't be a great deal of difference in the distance. There would be some.

Q. As soon as you started out, and you saw these lights from the side windows of the coach, you had gone a little ways then, I presume?

A. Yes, sir.

Q. Then when you discovered that, you went the nearest way, didn't you?

A. After we got down, yes.

Q. You went the nearest road. Now, you say you have taken the train there at Wilsonia at other times?

A. I took it a few times there.

Q. And did you go down the track the same way?

A. No, sir.

Q. Which way did you go to Wilsonia?

A. I came right down the street to Wilsonia.

Q. What?

A. I came down the street from up at New Town.

Q. The street?

A. Yes.

Q. On the other side of the track?

A. Yes, sir.

Q. Oh, you came down from Oswego?

A. From up in town.

COURT.—That is on the west side of the track?

(Testimony of Peter James Emmett.)

A. That is on the west side of the track.

COURT.—Was there a street along on the west side of the track?

A. Up into the new town.

COURT.—That is, down to Wilsonia from Oswego?

A. There is the road up on the hill.

COURT.—That is up on the hill further.

A. Yes, sir.

Q. How far away is that from the track?

A. It is up above; upon the hill like, a little ways.

Q. About how far?

A. Oh, 50 or 60 feet, up over the bank, I suppose.

Q. It is up above the track, is it?

Mr. FENTON.—Mr. Latourette, it adjoins the right of way—parallels it.

Q. Is there a bank between the track and the road?

A. A little bank, yes.

Q. Does that road run exactly parallel, or does it go further in some places than others?

A. Oh, pretty near; it runs pretty near straight.

Q. Is there any way to get from the track up onto that road?

A. You could go up around and go down the road, and come around down to Wilsonia.

Q. Well now, do you know whether the public generally have used all that right of way between Oswego and Wilsonia to travel back and forth?

(Testimony of Peter James Emmett.)

A. Oh, I have seen men on it.

Q. Going back and forth?

A. Walking around down the track.

Q. Did you ever see any trespass notices put up by the company?

A. No, sir.

Q. Warning the people not to?

A. No, sir.

Q. Are there any cattle guards there between the two places?

A. No, sir.

Q. On the right of way? Did you ever know of anybody being warned or given notice to keep off?

Objected to as immaterial.

Mr. LATOURETTE.—I will not insist on that question.

Q. Now, how often have you seen people traveling that way since you have been up there during the last year and a half, I think you said you had been there, or two years?

A. Oh, I don't know exactly.

Q. What?

A. I don't know exactly how often they traveled it.

Q. Well, has it been a pretty general thing to see them?

A. Oh, they would be on the track there, off and on.

(Testimony of Peter James Emmett.)

Q. That is walking between Wilsonia and Oswego?

A. Yes, sir.

Examination by the Court.

Q. Is there a trail or a path on the east side from where the culvert runs across the track?

A. No, sir.

Q. Inside of the fence there?

A. There's several trails crosses the track, but there is none parallel with the track.

Q. There is none parallel with the track?

A. Not on the east side, not that I know of.

Q. Is there any on the west side?

A. There is a kind of an old foot path there, that people walk down.

Q. That is, outside of the rails, on the west side?

A. On the west side, people traveled there. It aint much of a trail, only people walked up and down on the end of the ties.

Q. People can walk up and down there?

A. Yes, sir.

Redirect Examination.

Q. Now, from this bridge down to Wilsonia, how many trails are there running from the track up to the road on the west side?

A. I think there is two crosses the track.

Q. How many?

A. Two.

(Testimony of Charles Howard Elston.)

Q. At least two?

(Witness excused.)

CHARLES HOWARD ELSTON, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

What is your full name?

A. Charles Howard Elston.

Q. And your age?

A. 45.

Q. Your residence?

A. Oswego.

Q. Occupation?

A. Hay dealer.

Q. Your business is where?

A. In Portland.

Q. You reside at Oswego?

A. At Oswego.

Q. Travel back and forth on the Southern Pacific train?

A. Yes, sir.

Q. How long have you resided up there, Mr. Elston?

A. It will be nine years the 22nd of next April.

Q. How far, and in what direction, do you live from Wilsonia?

(Testimony of Charles Howard Elston.)

A. I live four blocks south and eight west from the station of Wilsonia.

Q. How far from Oswego?

A. It is one block north and eight west.

Q. So you reside westerly of and between these two stations?

A. Yes, sir.

Q. Is that all platted in through there?

A. Yes.

Q. Into lots. Between Wilsonia and Oswego?

A. Yes. That is, west of the track.

Q. What kind of a country is that through there as to being open?

A. Well, there is a hill between Oswego depot and Wilsonia, on the west side of the track.

Q. On the west side?

A. Yes.

Q. And on the east side, how is it?

A. Well, there is a cut running through there. It is an open view from Oswego to Wilsonia at present; but it was not prior to the building of the Willsburg cut-off. At that time you could not see Wilsonia station from Oswego depot.

Q. Well, on the east side of the track, between Wilsonia and Oswego, has that been cultivated land at all?

A. No, it has not.

Q. Or just what they call brush land?

(Testimony of Charles Howard Elston.)

A. Yes.

Q. But is it fairly open so that you can travel over it?

A. Oh, there's trees growing there, and brush, small fir trees and brush.

Q. Are there any trails through there?

A. Yes.

Q. How many?

A. Well, there's two trails I think. I am not very well posted on that, because I have never been down there but very little; some three or four times only.

COURT.—Two trails from Oswego to Wilsonia?

A. No. I understood him to ask if there was any trails below the track, between there and the river. That is the way I understood the question.

Q. Yes.

A. Yes.

Q. Where did these trails lead from?

A. From the foundry.

Q. From the foundry; and where do they lead to?

A. Well, the foundrymen use them in going backwards and forwards to their work at the foundry, between the foundry and their home.

Q. On which side of the track do these foundrymen live?

A. Well, part of them live on the west side, and part south from the foundry and Oswego depot.

Q. As between Wilsonia and Oswego, are there any houses on the west side of the track?

(Testimony of Charles Howard Elston.)

A. Yes, above the county road.

Q. Above the county road?

A. Yes.

Q. And are there any houses around Wilsonia, south of Wilsonia?

A. Nothing between that and Oswego, except up on the hill, above the county road.

Q. That is south and west?

A. Yes, west of the track.

Q. Now, these foundrymen, in going from the foundry where they worked to and from their homes, that is, those that lived up towards Wilsonia, which way would they go? Which way have they been going?

A. They would go up this trail over this little bridge to the railroad track, and those living in New Town would cross the track and go up the hill, while those living in South Oswego or Old Town, where they strike the railroad track from this trail, they go south past the depot at Oswego.

Q. Do you know how many trails there are between this bridge and Wilsonia, leading from the track up to the county road?

A. From the foundry to Wilsonia?

Q. Yes.

A. No.

Q. From this little bridge up to Wilsonia, how

(Testimony of Charles Howard Elston.)

many trails lead from the railroad track up to the county road?

A. Why, there's only one that I know of, between Wilsonia and Oswego depot.

Q. There may be others, though, that you don't know of?

A. There may be others. I never paid any attention to it.

Q. Now, at the time Mr. Evans, the plaintiff, was run over up there by this train, where were you?

A. I left Jefferson Street Depot on the 10:10 train that night for Oswego.

Q. Now, just state to the jury what you saw and heard from the time that you arrived at Wilsonia?

A. Well, we pulled into Wilsonia without any unusual delays at any of the stops along the line, and we got in there, I suppose, on time. I didn't look at my watch, but would judge that we did. And they stopped there some little time, quite a bit,—long enough, at least, that I got up and went out onto the platform between the two coaches to see what caused the delay. And I saw the conductor working the new switch that they had just placed that day. He was working it backwards and forwards, to get it in working order so it would work easy to make the flying switch. And he worked there some little time after I went out on the platform, and finally got it working to suit him. They made the fly and run in ahead and

(Testimony of Charles Howard Elston.)

coupled on, and was backing up to Oswego, and the conductor came through between the two coaches. I just stayed on the platform—it is only a little ways from Wilsonia to Osewgo—and *just before the train started, the conductor came through with his lantern. And after the train was in motion, a brakeman came through with what they call markers, or rear lights, supposed to be on the coach. And we had run just a little ways when they gave the two bells to stop. Well, I went up the steps on the platform, and through the front coach, in back and up to the front platform, and the brakeman was just about the door, and I went past, and the conductor was standing on the platform. I followed the conductor down. I first asked him, I says, “Is somebody struck?” And he says, “Yes.” He walked right down the steps on the side that the boy was thrown off of, and I followed right behind him. And we went back down the track some little distance, and in walking along I got ahead of him. And I got down to the boy just ahead of him. He was right behind me, though. And found the boy laying there. And I examined him to see what shape he was in, and found the condition of his leg. It was cut off just below the knee, just a little ways, and ground up clear down to, or about the ankle joint—all mangled. And of course the first thing I thought of was to give aid to the boy.*

Q. Was the boy a stranger to you?

(Testimony of Charles Howard Elston.)

A. He was, yes.

Q. At that time?

A. That was the first time I ever saw him that I know of. I asked some of the boys if they had anything to bind up the limb with. Nobody had anything. I started to take off my coat when the engineer, Mr. Craw, said that he would get a bell cord—a piece of the bell cord—if I remember right. I think it was him. At least they brought the cord, and I bound up the limb just above the knee as tight as I could, and stayed with the boy till he got to the hospital. In fact, I was with him from that time on till the operation was over and he was wheeled into the ward.

Q. Now, sir, you heard the signal to stop, did you?

A. I did.

Q. What was that? What kind of a signal?

A. Two bells.

Q. You heard that distinctly?

A. Yes, sir.

Q. And you knew something had happened then?

A. Yes, sir.

Q. Now, can you tell the jury, can you say positively, where that brakeman was at that time?

A. All I know is this: The brakeman passed through between the two coaches after the train was in motion, and just before it struck the boy; but a very little bit before, as I remember it.

(Testimony of Charles Howard Elston.)

Q. Now, you were between these two coaches?

A. I was between the two coaches. I was standing on the platform of what was the rear coach in going out from Portland.

Q. Let us get that. Now, we will say the engine was here. This is the front coach, and this is the rear one, backing this way. You were in here on the rear platform of this first coach back of the engine?

A. I was after they made the flying switch, and the engine run in on the main line and coupled on, I was on the front platform of the coach connecting with the engine.

Q. And the train was backing?

A. Yes, sir.

Mr. FENTON.—The front platform?

Mr. LATOURETTE.—This is the engine here, and this is what he calls the rear coach here. Now, they were backing up towards Oswego?

A. Yes, sir.

Q. And you were on the rear platform of this coach next the engine?

A. I was on the platform of the coach next the engine, standing on the lower step.

Q. As they were backing?

A. Yes.

Q. Now, the engineer passed by you with his two lanterns?

A. The brakeman.

(Testimony of Charles Howard Elston.)

Q. The brakeman, yes.

A. Yes.

Q. And you saw him go into this car?

A. I did.

Q. And you say shortly afterward that you heard this signal to stop?

A. Yes.

Q. Now, how far could that brakeman have got inside of that car?

A. Well, he couldn't have got, I don't think further than the center of the car.

Q. Further than the center of the car?

A. He couldn't have been further than that, I don't think, while I didn't see.

Q. *When you went in after you heard that signal, you went into this coach through the door, and you saw the brakeman inside, didn't you?*

A. *Yes, sir.*

Q. *He hadn't got outside?*

A. *He was just at the other door, just about the other door, possibly right by the stove.*

Q. *He hadn't got out of that car?*

A. *No, sir.*

Q. *Until after the signal to stop was given?*

Mr. FENTON.—*I want his answer there.*

A. *Well, of course, what I meant was this. When I got through the car, there was where the brakeman was. I doⁿ't say that he hadn't been on the platform.*

(Testimony of Charles Howard Elston.)

because I wasn't there to see; but when I went through the car, he was standing just about the door.

Q. You say that when he went into the car he wouldn't have had time to have got more than the center of the car, you think, before the signal was given?

A. No, I don't think he could have got more than to the center of the car.

Q. He couldn't have got out to the rear end?

A. No.

Q. Now, how long did you stay with that boy?

A. I stayed with him till the operation was over, and he was wheeled into the ward. I stood at the foot of the operating table and watched it through.

Q. Did you go with him that night to the hospital?

A. Yes, I did.

Q. He was a stranger to you, was he?

A. Yes, sir, an entire stranger.

Q. Who else went with you?

A. Pete Emmett.

Q. The young man that was on the stand ahead of you?

A. Yes.

Q. He went with you?

A. Yes.

Q. Anybody else?

A. No one else.

Q. You didn't see any of the train men go up to the hospital did you?

(Testimony of Charles Howard Elston.)

A. No, sir.

Mr. FENTON.—What do you claim for that, Mr. Latourette?

Mr. LATOURETTE.—I want to find out who were actually there. That is all.

Q. So that you two were the only two that went with him?

A. Went in the ambulance, yes.

Q. Mr. Elston, you were then, after that train had made the flying switch, you were outside all the time?

A. I was.

Q. On the platform?

A. I was; until they gave the signal to stop, and then I went through the coach, and on to the front end.

Q. You heard that signal to stop plainly?

A. I did.

Q. Did you hear any bell rung in the engine?

A. Well, sir, that I couldn't say. I don't remember of hearing any bell at all. There was nothing that I remember of.

Q. Did you hear any whistle blown?

A. I did not.

Q. Were you in a position where you would have been likely to have heard a bell or a whistle?

A. I was in a position to have heard it, but at the same time I would not probably have noticed it, not thinking anything at all.

(Testimony of Charles Howard Elston.)

Q. Do you know whether they had any automatic bell or not on the train?

A. Automatic bell? I couldn't say whether there was on that engine or not. I couldn't say. I know they had one on one of the engines at Jefferson Street, but whether it was on that engine, I could not say. I don't know which engine it was on.

Q. Now, on which end of the train was that engine when it started to back up to Oswego?

A. On which end of the train?

Q. Yes, north or south?

A. It was on the north.

Q. Now, you lived out there nine years?

A. Will be next spring.

Q. Are you familiar with the roadway, that is, the railroad roadway, between Oswego and Wilsonia?

A. I am.

Q. I will ask you what has been the custom, as far as you know, of the public to use that right of way for travel between those two stations?

A. I have seen them walking up and down.

Mr. FENTON.—I object to that as immaterial, and as incompetent, and not pleaded. That particular path is not pleaded. The only claim they make is that there was a path that this plaintiff went over to get to the right of way at the end of the station. Now, they are undertaking to show that the public was permitted to travel between stations. The com-

(Testimony of Charles Howard Elston.)

pany could not very well keep them off without they put a guard over it.

Objection overruled. Defendants allowed an exception.

(Question read)

A. Well, it has been traveled there ever since I have been in Oswego. I have seen them numbers of times, most any day as far as that is concerned, walking up and down the track between Oswego and Wilsonia. There is some little hill over the county road, and I suppose for that reason they have been using that more or less.

COURT.—You mean that they crossed the track and went up on the county road, or do you mean that they walked up and down the track?

A. Well, they would walk up and down the track, and they often do that yet. When they come down to Wilsonia to wait for the train, if they have got a little time, I have known numbers of times, they will walk up to Oswego in place of waiting there for the train.

COURT.—Walk up on the track?

A. Yes.

Q. So that people that wish to take the train at Wilsonia sometimes walk up the track and take it at Oswego?

A. Yes, sir.

Q. And vice versa?

A. No. No, I never knew them to walk from Os-

(Testimony of Charles Howard Elston.)

wego down to Wilsonia. Not that I know of. Of course I paid no particular attention to it at all.

Q. Is that a pretty good walk, that is, the road between the rails, is that pretty smooth and good walking?

A. Well, fairly so, as much as the ballast usually is on a railroad track.

COURT.—Simply walking on the ties, is it?

A. Yes.

Q. Walking between the rails, you mean?

A. Well, yes, in between the rails. Well, I never paid any particular attention. They was just coming up the track. Whether they was between the rails or outside of the rail, I couldn't say as to that.

Q. Walking on the ties?

A. Yes; yes. I have saw them walking on the ties.

Q. Now, how long had the public used that roadway in that way, to your knowledge?

A. Ever since I have been in Oswego.

Q. That has been how many years?

A. It will be nine years the 22nd of next April.

Q. Has there, during any of that time been a fence, or any cattle guard, on that right of way?

A. There was not.

Q. Or any notice—trespass notices or anything of that kind?

A. Nothing of the kind that I have ever saw.

Q. Do you know whether the use by the public has

(Testimony of Charles Howard Elston.)

been such that the company and its agents knew of that use?

A. Knew of the use?

Q. Yes.

A. Why, they certainly did.

Q. Sir?

A. The agent at Oswego certainly must have known of its being used. I don't know whether the railroad officials knew of it or not; that I could not say; but the agent at Oswego certainly knew it was.

Q. Was it apparent to every one, I mean?

A. Why, certainly it was.

Q. Who might have been in the vicinity. Do you know whether there were any trails across the track and leading up—oh, I think we went over that.

A. Yes.

Q. Now, you say that you know of their traveling from Wilsonia to Oswego up and down that track?

A. Yes, sir.

Q. To take the train at Oswego?

A. I have heard the remark made, if I would be waiting for the train in the morning and some one would walk up from there, "Well, I had so long to wait, I thought I would walk up," something to that effect. But then I have seen them using the track between Wilsonia and Oswego. The foundrymen, as I say, would come up this trail to the railroad track, and those living south would come up the track, and

(Testimony of Charles Howard Elston.)

past the depot in going home.

Q. You have seen them using it both ways going back and forth?

A. Yes.

Mr. FENTON.—You mean going towards Oswego?

Mr. LATOURETTE.—Yes.

Q. I will ask you what is the fact.

A. Well, I have seen the foundrymen going past along the track, past the depot until they come to this trail or the steps leading down. There is two trails comes up to the track just below Oswego depot, between Oswego and Wilsonia. There is one place has steps, and the other place is a trail. And I have seen them coming up those steps and coming up the track, and in the same way in going to work in the morning.

Q. Have you seen them going toward Wilsonia along that right of way too?

A. Yes.

Q. That has been common has it?

A. Yes, it has.

Q. For all this time?

A. Ever since I have been in Oswego when the foundry was running.

Cross Examination.

(Questions by Mr. Fenton.)

Mr. Elston, just a few questions, please. If I understand you, the workmen, while they were working

(Testimony of Charles Howard Elston.)

down at the foundry, would have occasion to use this trail, and would come up to the track where this culvert is, or bridge, or whatever it is, and would go on the track, and either go across it and up over the hill to their homes, or walk down the track to Oswego and go on south.

A. Well, those living in New Town would usually take the trail directly across the track and up the hill.

Q. Yes, go right straight across.

A. Yes. Those living in Old Town and South Town, would come up to the railroad track, and then follow the railroad track up past the depot.

Q. Up to Oswego?

A. Yes.

Q. That is what I mean.

A. Yes, going south.

Q. Now do you know of any workmen ever coming up to that track, and then going to Wilsonia, 700 feet north, to go home?

A. No, I have not.

Q. As a matter of fact, there is none of those workmen that had a home in that direction.

A. Well, really, I don't know whether any of them lived—there is some lived in above Wilsonia.

Q. Yes, but they went across and up the hill.

A. As far as I know, they did. I cannot say that I ever saw them traveling.

Q. Now, you speak about the people using as a

(Testimony of Charles Howard Elston.)

footpath the ties, or between the rails, between this place where these people would go on the track to Oswego, and you speak of people walking from Wilsonia sometimes up to Oswego to take the train when they had a little time to wait. Now, as a matter of fact, you have noticed people walk on tracks between the rails in many places? That is not peculiar to that particular place, is it?

A. Well, no, I don't know as to that. The only reason, as I said, that I could see that they do that, is on account of the hill, going over the hill on the county road.

Q. It is a little easier to walk between the rails that short distance than to go up the bank and into the county road, and walk in a muddy road?

A. Yes.

Q. And haven't you seen them walk between the rails north of Wilsonia, on towards Portland—footmen wanting to come this way?

A. Well, I couldn't say that I have no. Possibly have, but paid no attention to it. There is no occasion for any travel down north of Wilsonia, from that on.

Q. It is simply a matter of convenience for these people to walk there whenever they wanted to—these workmen?

A. Yes.

Q. Now, as I understand Mr. Elston, your residence is four blocks south and eight blocks west of Wilsonia?

(Testimony of Charles Howard Elston.)

A. I think it is four blocks from Wilsonia south.

Q. Now, Wilsonia—how long has that been there as a station?

A. Well, something like four years, I think, I don't just remember.

Q. Is it a place where many people get on, or do most of them get on at Oswego?

A. Well, the largest number get on at Oswego, I think.

Q. The distance is said here in the testimony to be about 1300 feet between those stations. Is that about your judgment?

A. Something like that yes.

Q. Now, this county road that is on the west side of the right of way there, that parallels the right of way, doesn't it, between Wilsonia and Oswego?

A. It does, yes.

Q. And is that a fairly good road?

A. It is.

Q. It is a macadam road, isn't it?

A. Yes.

Q. And the right of way runs right up to the 60 foot road, county road?

A. Well, I suppose they join, but I couldn't say just how much right of way they have there.

Q. And people who have wanted to walk from Wilsonia to Oswego, and from Oswego to Wilsonia, could walk on that public highway, if they wanted to. couldn't they?

(Testimony of Charles Howard Elston.)

A. They could, yes, sir.

Q. But it is a little harder and firmer to walk between the rails?

A. Yes.

Q. If they want to. Now, if I recollect your testimony, Mr. Ellston, the engine being here toward Wilsonia, and this being the coach immediately behind the engine, and this what we call the rear coach, you were on the platform between these two coaches?

A. Yes, sir.

Q. When you heard the two bells for stopping?

A. I was.

Q. And you immediately walked through that car after you heard it?

A. Yes, sir.

Q. Now, how far did you get before the train stopped? How far did you get through the car before the train came still, to a dead stop?

A. Well, now that I couldn't say.

Q. Do you recollect, Mr. Elston, whether you got to this door here before it stopped?

A. No, sir, I could not tell you.

Q. But that coach was lighted up, was it?

A. Yes.

Q. Both coaches were lighted up?

A. Both coaches were lit up.

Q. And they had the usual glass windows on each side?

(Testimony of Charles Howard Elston.)

A. Yes, sir.

Q. Do you remember the door here whether it had a glass in the rear?

A. It did.

Q. And when you got through there the conductor, as you recollect it, was either in the door, or had just stepped through?

A. The conductor was standing on the platform just out of the door to the left.

Q. Oh, outside?

A. Just outside, to the left.

Q. Outside. Well, now, how was his back with reference to that door? The door is in the center, isn't it?

A. Yes.

Q. Do you remember how he stood there?

A. Well, sir, I do not.

Q. Was he facing toward the east or facing toward Oswego, or could you tell?

A. If I remember right, I think he was facing the east, but I could not say.

Q. That would be the direction where the boy was?

A. Yes.

Q. Well now, when you went out there, had the boy already gone under the wheels, or had he just struck?

A. Why, the boy was struck before—I suppose

(Testimony of Charles Howard Elston.)

the boy was struck before I left the platform between the two cars. The signal to stop was given before. That is the reason. I went up the steps and through the coach.

Q. About how far do you think that coach moved from the time the signal was given to stop until it did stop?

A. Why, it was about a car length; possibly a little bit more, I think it was.

Q. Can you give the jury an idea about what the length of that coach was?

A. About the length of that coach? Well, I should judge it was about 40 feet.

Q. So while you walked 40 feet the car moved about 40 feet?

A. Well, I don't know. I didn't start to go through until after the signal was given to stop.

Q. That is what I mean.

A. Yes.

Q. The car moved you say, about 40 feet after the signal was given, as I understand you.

A. Well, from where the boy lay—from where the boy lay, from the time it struck the boy, it must have moved probably 40 or 50 feet. I think it was a little more than one length of the coach.

Q. You just walked through this way, did you?

A. Well, sir, I don't know whether I walked or whether I ran. I don't remember. I thought that

(Testimony of Charles Howard Elston.)

something had happened in giving the two bells to stop, and may have run through the coach. I don't remember.

Q. You don't know whether you went faster than the train was going or not?

A. No, I don't know. I don't remember.

Q. When you got off there, who was first off on the ground?

A. The conductor.

Q. He had his lantern?

A. Yes.

Q. Was it lighted?

A. Yes, sir.

Q. Did he have it on his arm?

A. I think he was carrying it in his hand.

Q. And the brakeman had what you call the markers?

A. Yes, sir.

Q. And he had preceded you?

A. Yes.

Q. Did you see him when you came out?

A. He was just about the door when I went through.

Q. Did he go out before you, or behind you?

A. I think I went out first, but I would not say as to that.

Q. You are not certain as to that?

A. No, I am not certain as to that.

(Testimony of Charles Howard Elston.)

Q. You thought an accident had occurred, and you were looking to see what had happened?

A. That is the idea, exactly.

Q. Now, where did you find Evans, when you got out here. Where was he?

A. He was back about probably 50 feet. I don't just remember what the location of the train was.

Q. What would you say as to how many trucks passed over him—how many wheels?

A. That I couldn't say, how many passed over him. I don't know.

Q. That train was moving back at the time, not over as fast as a man could walk?

A. Yes, it was under better headway than that.

Q. Five or six miles an hour, do you think?

A. Well, I should judge something like that.

Q. And you didn't hear any bell or whistle, but there might have been such a thing, and you not heard it?

A. Yes, sir, there might have been. I could not say whether there was or not.

Q. Like a man sitting in a room, and a clock would strike, and he might not hear it?

A. Yes, that is the idea, exactly.

Q. Unless his attention was particularly directed to it, why, he might not hear it.

A. That is true.

(Testimony of Charles Howard Elston.)

Examination by the Court.

Q. I understood you to say the townsite was laid out there on the west side of the track?

A. It is.

Q. Is that townsite across the track?

A. No, sir.

Q. All on the west side?

A. On the west side.

Q. So that the track itself is not running within any townsite?

A. I don't think that that was within—well, in fact, I am almost sure it was not in platted ground.

Redirect Examination.

Q. This county road, how does that lie with respect to the townsite? Is that a street?

A. To the townsite? How is that?

Q. Is that a street, the county road you speak of on the west side of the track, is that a street or a county road?

A. That is a county road.

Q. Well, is that inside of the townsite?

A. Why, it is now, but I don't think it was. I don't think it was inside of the plat. I couldn't say as to that. I don't know. I could not tell you.

Recross Examination.

Mr. FENTON.—Just a moment. Your Honor, I neglected to show this photograph to Mr. Elston. I don't know whether he can recognize it or not, with

(Testimony of Charles Howard Elston.)

the permission of the court, I would like to show it to him.

COURT.—Very well.

Q. I wish you would look at that photograph, which purports to be a photograph of the track, looking towards Wilsonia, the camera being about 800 feet away from Wilsonia station, and looking north, and ask if you recognize that as a fairly good picture of the track and the embankments, and the location of Wilsonia in the distance, as it was at that time, where this little sign is.

A. Yes, I recognize that. That looks to be the same place; and at the end of this cut here was where the boy was struck.

Q. About how far from Wilsonia would you say the boy was when he was struck, in feet?

A. Well, I should judge in the neighborhood of 600 feet, possibly a little more.

Q. Well now, this culvert that comes down the hill from the east side, and comes and leads from the path onto the track, how far is that, in your judgment, south of Wilsonia?

A. Well, I hardly know. This little culvert that they speak of, if it is where I think it is, it is quite a ways from the railroad track.

Q. How far from the railroad track?

A. I should think it was 75 feet.

Q. East?

(Testimony of Charles Howard Elston.)

A. Yes.

Q. And what is it for? What is the culvert there for?

A. Well, it is not really a culvert. I don't know just what they mean by it. It is possibly the little culvert crossing the water ditch that runs the water engine there. I don't know just where they have reference to. But this trail, as I understand it, that they came up, as near as I know, is, oh, I should judge something like 1,000 feet from Wilsonia.

Q. Up towards Oswego?

A. Towards Oswego.

Q. And that is the trail that leads from the foundry up the hill?

A. Yes, where this one trail crosses. As I said, there was two trails. There is one right near the Oswego depot, and then this other one a little further down.

Q. About 300 feet north of Oswego station?

A. 300 or 400 feet—something like that.

Q. Your understanding is they came up there, and this culvert you speak of is 75 feet from the tracks?

A. There is a little bridge that comes over the fence, and there is another little culvert crossing the water ditch. Which culvert they mean, I don't know. Not a little bridge—

Q. This fence you speak of is the fence the Oswe-

(Testimony of Charles Howard Elston.)

go Iron Company have between their land and the right of way of the company, isn't it?

A. Well, I don't know whether the railroad company's right of way runs down that far or not. It is quite a ways down. I hardly think it.

Q. It is parallel with the track?

A. No, it is not.

Q. Isn't it?

A. It is, I should judge, something like 75, possibly 100 feet from the railroad track down to this bridge across the fence at that point; while this fence angles, I think at least down at Wilsonia it comes up within probably 30 feet of the railroad track. Whether there is any bend in between those two points, I don't know.

Q. Now, as a matter of fact, Mr. Elston, there isn't any culvert, or bridge, or anything of that kind on the company's graded track?

A. There is nothing of the kind that I know of there.

Q. This bridge that they speak about, the one you recognized on that path, is about 70 feet east of the tracks?

A. The one crossing the fence. The one crossing the water ditch is probably 30 feet.

Q. Do you know what they were put there for? Can you tell from the looks of it?

A. Well, they were put there, I suppose, for the

(Testimony of Charles Howard Elston.)

foundrymen to cross backwards and forwards to their work.

Q. They are on the grounds of the Oswego Iron Company.

A. I think they are, yes, as far as I know.

Mr. FENTON.—I offer this photograph, your Honor.

COURT.—Very well.

Marked Defendant's Exhibit 1.

Redirect Examination.

Q. You say that fence around the Oswego Iron Company's pasture was not built with reference to the line of the right of way at all?

A. I don't think so.

Q. That the nearest point to the right of way, you think, is near Wilsonia, where it comes within about 30 feet of the right of way?

A. Yes, of the right of way, of the railroad track.

Q. And at the other end, how far away would it be?

A. It must be 75 to 100 feet. I don't know. It was some little distance down there.

Q. Now, do you recognize this photograph?

A. Yes, sir; that looks to be a picture of the track above Wilsonia.

Q. What do you mean? Do you mean that the general appearance of it is?

A. Yes, sir.

(Testimony of Archie Worthington.)

Q. You don't pretend to say the details are correct?

A. Well, it looks it to me. It looks to be taken in the cut up nearer Oswego depot; just at the end of that bluff on the right looks to me to be where the boy was lying when I found him.

Q. How high is the county road above the track here?

A. Well, at the highest point it must be 30 feet.

Q. Is that this point that you can see on the photograph?

A. Yes. That looks to be the highest point.

(Witness excused.)

ARCHIE WORTHINGTON, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

State your name, age, residence and occupation.

A. Archie Worthington; Oswego; and I work in the foundry company.

Q. How old are you?

A. Twenty-six, 12th of last November.

Q. How long have you lived in Oswego?

A. Well, I have been practically raised there.

Q. Are you acquainted with the ground between Wilsonia and Oswego?

A. Well, yes, I am pretty well acquainted with it.

(Testimony of Archie Worthington.)

Q. Have you ever been over that track running down there?

A. Yes, sir.

Q. From one station to the other?

A. Yes.

Q. How many times?

A. Oh, I could not say how many times. Not a great many times because I don't travel that. I generally go down that way towards the foundry when I am working, and I very seldom ever travel that way.

Q. Now, Mr. Worthington, are you acquainted with this plaintiff, Thomas Evans?

A. No, sir.

Q. You know him by sight?

A. I know him by sight since the night I seen his hurt.

Q. Where were you at the time he was hurt in this railroad accident?

A. Well, I was on the front coach, on the front end of the coach.

Q. You mean the south end?

A. Yes, on the south end on the east side of the coach.

Q. The end toward Oswego?

A. Yes, sir.

Q. As the train was backing?

A. Yes, sir.

Q. Now, were you a passenger on that train?

(Testimony of Archie Worthington.)

A. Yes, sir.

Q. Where had you been?

A. I had been in Portland.

Q. And what seat were you in, taking this to be the rear coach, and Oswego to be up here, the cut to be here—now what seat, how far from the back?

A. Well, I was pretty close to the end, the second or third seat from the end. I don't just remember which seat it was.

Q. Which way were those seats facing?

A. Facing?

Q. Which way were you facing, at least—Oswego or the other way?

A. I was facing Oswego at the time.

Q. The seats were turned, and you had been coming—at least the engine had been on this end of the train?

A. Yes, sir.

Q. Up until they had reached Wilsonia?

A. Yes, sir.

Q. So that you were facing Oswego?

A. Yes, sir.

Q. Now, just tell the jury what the first thing was that you noticed, and what you saw and heard at the time of that accident.

A. Well, the first thing I heard was the signal for the train to stop; and, well, before that, before the signal, I seen the conductor, Mr. Keyzer, come

(Testimony of Archie Worthington.)

through the coach. He had a lantern in his hand. He stepped to the door, and just as he opened the door and stepped on the platform he says, Look out! Look out! And at that why he stopped the train—give a signal to stop the train. Well, I jumped up. I knew there was something or other had stopped the coach. He said something about it being too bad, too bad! Something to that effect. At that I got off the coach and went on down, and saw the boy. He was over the bank. There was an embankment and he had some way or other rolled over the bank after the train had run over him. When I got there he was sitting up, and I think it was Mr. Elston was tying his leg up with rope or something.

Q. Which side of the train were you on, the river side or the other side?

A. I was on the river side.

Q. And the conductor came right there; and you was sitting here facing the back end, and he came through and opened the door?

A. Yes, sir.

Q. Now, how long after he had opened that door was it that he hallooed?

A. Just as soon as he got on the platform he says, Look out! Look out! At that he—

Q. Did he halloo in a frightened sort of way—shout to them?

A. Well, he hallooed pretty loud, yes.

(Testimony of Archie Worthington.)

Q. Did he appear to be excited?

A. Well, I don't know as he appeared to be—

Q. Just tell the jury about his manner.

A. Well, as near as I can recollect he hallooed fairly loud for him to get out of the way, I suppose. He says Look out! Look out! At that he reached up and pulled the string and stopped it. And then I—of course I got up and as I went out—started to go out—why he said something or other about it was too bad, or something or another of that kind. I don't just remember what it was he said, but I think that was what it was.

Q. How fast was that car going at that time?

A. Well, I could not say just how fast it was going. It had got started. It was going a fairly good lick.

Q. Did the conductor act in a hurried sort of a way? Was he quick about giving the—

Mr. FENTON.—I object to the leading character of the question.

Mr. LATOURETTE.—I know it is a little leading, but we want to call the attention of the witness to the subject matter.

Q. Just state to the jury so they will see as near as they can from you, Mr. Worthington, how the conductor acted, whether he seemed to be quick in his action.

A. Well, he seemed to be, yes. He seemed to be

(Testimony of Archie Worthington.)

quick about his action, about reaching for the string, as near as I remember about it.

Q. Did you speak to him when he went through?

A. No, I did not.

Q. Well, how many passengers were there in that coach?

A. Well, I could not say how many there was. There was one or two more besides me. It seems to me there was two more.

Q. In that coach?

A. Yes. I don't just remember who they was, and they were strangers to me.

Q. You saw them make the flying switch there, did you, at Wilsonia?

A. Yes, they made a flying switch at Wilsonia.

Q. And changed the engines to the other end of the train?

A. Yes, sir.

Q. Now, how long had you been going—how far had the train gone when they struck Mr. Evans?

A. Well, I could not say just how far, but the train had got started at a pretty good lick.

Q. About how fast was it going an hour?

A. Well, I don't hardly know. I wasn't paying any particular attention about how fast it was going, but then it had got started.

Q. It was under some headway? A. Yes.

Q. Where was this brakeman?

(Testimony of Archie Worthington.)

A. Well, I never seen the brakeman at all.

Q. You didnt see the brakeman?

A. Not that I remember, seeing the brakeman at all. If I did I never noticed.

Q. The brakeman had not got along there, you are quite sure, when he pulled that bell?

A. No, the brakeman had not.

Q. Of course, after that there was some excitement I presume?

A. Oh, yes.

Q. Now, did that train make any—how was it about the noise—whether the train made any noise or not—did you notice?

A. You mean whistle?

Q. No. I mean the train itself.

A. Well, I don't—I suppose it did some. I never paid any particular attention.

Q. You didn't notice? A. No, I didn't notice.

Q. Well, sir, did you hear the bell ring?

A. I did not.

Q. Or the whistle sound? A. No, sir.

Q. Would you have heard—were you in a position so you probably woud have heard?

A. Well, I could not particularly say about that because I was not paying much attention. The way it was—

Q. How many days had they been using that flying switch?

A. Well, I could not say about that because that—

(Testimony of Archie Worthington.)

I didn't usually go to town only on Saturday nights or some time like that.

Q. How far did that train run—

COURT.—You asked that question a while ago—after it hit him.

Mr. LATOURETTE.—That was merely preliminary. I want to show how many times it stopped and where it ran and between what two points it ran; how many stops were made between Portland—

COURT.—I don't think that is material here, the stops it made between Portland and Wilsonia.

Mr. LATOURETTE.—The idea I had, your Honor, was that this was merely a sort of an interurban train, or a local train running between Oswego and Portland. I suppose that to be a fact.

COURT.—I don't suppose that would be denied.

Mr. FENTON.—It is not denied. There is no claim here that they were behind time, or anything of that kind.

Mr. LATOURETTE.—I suppose they have a right to run behind time or ahead of time; but the fact is that this was practically an interurban train—two coaches and an engine.

COURT.—Well, I don't suppose that would make any difference here. You allege this accident happened at Wilsonia while the train was moving South, and there is no use taking up the time of the court in—

(Testimony of Archie Worthington.)

quiring about the other stations along the way. You are taking a good deal of time with this case.

Mr. LATOURETTE.—I don't know that it would be material. That is all.

Cross Examination.

(Questions by Mr. Fenton.)

Just a few questions, Mr. Worthington. As I understand you, you were going from Portland to Oswego?

A. Yes, sir.

Q. And when you got to Wilsonia the train made this switch?

A. Yes, sir.

Q. And turned the engine around on the other end?

A. Yes, sir.

Q. And you were sitting in this coach, two or three seats from the back end of it, facing towards Oswego?

A. From the front end, that was, going towards Oswego. I was sitting two or three seats from the end that struck the boy.

Q. Yes, I understand; and on the west side of the car?

A. And on the East side of the car.

Q. On the river side? A. Yes, sir.

Q. And you saw the conductor come through with his lantern, and you saw him go outside and call out to somebody—you didn't know who it was.

A. No, sir.

(Testimony of Archie Worthington.)

Q. Look out?

A. Yes. Just as he opened the door he stepped out and says, Look out! Look out!

Q. And then what did he do?

A. He pulled the string.

Q. Now, where did he get that string?

A. It is right up over his head, about that far, and he reached up—

Q. And that string sounded—when that string was caught what happened?

A. Why, there was two—he pulled—there was two whistles or whatever it is to stop the train.

Q. Now, then, how long would you say it was from the time he pulled that rope until the train actually stopped—I mean now in time?

A. Well, I could not say just how long it was in time.

Q. About how long? Suppose you had your watch, now, and were thinking—About how long does it seem to have been to you?

A. Oh, I could not say. It stopped right immediately. It ran, I should judge, about forty or fifty feet.

Q. That is to say, after the whistle was given, the bell to stop—it ran forty or fifty feet?

A. Yes, sir, something like that.

Q. And did you get up out of your seat and go out on to the rear platform?

(Testimony of Archie Worthington.)

A. Yes, sir.

Q. And had the conductor gone down the steps?

A. As I first got up he was standing in the door, I believe, and then he got down and went on.

Q. Was the door open at the time you first saw the conductor in the door?

A. Yes, sir.

Q. Had it—do you know if the door was open as they were backing?

A. No, I think not. I think as the conductor came through with his lantern he opened the door.

Q. And did it swing back—fasten?

A. Well, I don't remember that—whether it did or not.

Q. But he stepped clear out on the platform and called to somebody?

A. Yes, just as he stepped out on the platform he said, Look out! Look out!

Q. Now, you don't know where the boy was at that time?

A. No, I do not.

Q. These coaches were lighted, were they?

A. Yes, sir.

Q. And they had glass windows on both sides?

A. Yes, sir.

Q. And this door had a glass window?

A. Yes.

Q. And will you say that train was backing at the rate of four or five miles an hour?

(Testimony of Thomas Fox.)

A. Well, I could not say positively, but I think it was traveling a fairly good lick.

Q. Stopped within fifty feet?

A. Yes, something of the sort.

(Witness excused.)

Adjourned until 10 o'clock the following morning.

Portland, Oregon, December 17, 1910, 10 A. M.

THOMAS FOX, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

What is your full name, Mr. Fox?

A. Thomas.

Q. Where do you live? A. I live in Oswego.

Q. How long have you lived in Oswego and vicinity?
A. Twenty years last May.

Q. Are you familiar with the railroad track between the station at Oswego and Wilsonia?

A. Yes, sir.

Q. And thereabouts? A. Yes, sir.

Q. I will ask you whether or not you ever lived down in the vicinity of Wilsonia, and if so, where?

A. I lived down north of Wilsonia, down on that old ranch, for eleven years.

Q. How far north of Wilsonia?

A. Oh, I suppose it is something like seven or eight or nine hundred feet—like that.

(Testimony of Thomas Fox.)

Q. How long did you live on that place?

A. Eleven years.

Q. Have you a family? A. Yes, sir.

Q. How many children have you?

A. Eleven—did have when I was there.

Q. Now, are you familiar with the county road leading from Wilsonia up to Oswego?

A. Yes, sir.

Q. What is the condition of that road?

A. Well, it is rough. It is a hard-surfaced road now. It used to be muddy, but it is hard-surfaced now. It is a rough road, though. It ain't smooth.

Q. How long since it became a hard-surfaced road or a made road?

A. Oh, something like ten years, I guess.

Q. And prior to that the road was rough, was it?

A. Sir?

Q. Was the road rough prior to that?

A. Yes, sir.

Q. Now, you may state what you know in relation to people traveling the railroad track from Oswego down to Wilsonia.

Mr. FENTON.—I just want to save the same objection, your Honor, that I made on the other, that this is immaterial and irrelevant as applied to the facts of this case.

COURT.—Very well. The court will overrule the objection. Exception allowed.

(Testimony of Thomas Fox.)

Q. You may answer the question, Mr. Fox.

A. While I lived down there, me and my family and the general public that was afoot traveled the railroad track, I would say, anyhow, pretty near ninety per cent of them would travel the railroad track. I always did myself, and my family. The children went to school. We traveled the railroad track except going across the trestle. We didn't allow our children to go across the trestle if we knew it, but they would cross the bridge, and then come back up onto the railroad, and go from Wilsonia up to the schoolhouse on the railroad track.

Q. Now, in order that the jury may understand, I will ask you another question. You speak about the bridge—what bridge do you allude to?

A. The county road. The county road runs parallel with the railroad.

Q. North of Wilsonia, toward Portland?

A. Yes, north of Wilsonia. The trestle across Trine Creek, the railroad trestle, and then the county bridge runs right west of the railroad trestle.

Q. How far is Wilsonia south of the railroad bridge and the wagon road?

A. Oh, a couple of hundred feet—150 feet—something like that.

Q. And you lived on the north side of it?

A. North side of that.

Q. State, if you know, whether or not people visit-

(Testimony of Thomas Fox.)

ing your home, and going down in that vicinity—I mean, other than your own family—traveled that track.

A. Yes, sir, traveled the track.

Q. Did you ever see any notices there—trespass notices?

A. No, sir.

Q. Did you ever receive notice not to travel or use the railroad track?

A. No, sir.

Q. You spoke about your children going to school. Where is the schoolhouse with reference to that railroad track, with reference to the station?

A. It is south, a little west of south. The schoolhouse, I guess, is something like a quarter of a mile beyond the Oswego depot—south.

Q. School children in going from that part of the country would go up the track, would they?

A. Yes.

Q. And pass the station at Oswego, and go to school?

A. Yes, sir.

Q. And return the same way?

A. Return the same way.

Q. Was it used generally?

Objected to as leading, and as calling for a conclusion of the witness.

Q. About how many people lived in north of Wilsonia?

A. Well, at that time there wasn't but a very few. There was the section boss and two other parties lived down in the lower end of that old ranch, between

(Testimony of Thomas Fox.)

that and Elk Rock. One was an old bachelor, and the other was a man with his mother and a boy, a nephew of his, that lived on the ranch.

Q. Did they travel that road?

A. Yes, sir.

Q. Now, when did you leave that farm?

A. I moved off there in January, 1904-1905.

Q. Are there or are there not more people living down there now?

A. Oh, yes, there's quite a few people there now. There's something like twelve or fifteen families, I guess.

Q. Now, you may state, if you know, whether or not those people use the railroad track.

A. Well, they don't go to Oswego very often. They are mostly people that works here in town. As far as them traveling the track, I couldn't say whether they do or not.

Q. If you know, state whether or not strangers travel the railroad track.

A. I have seen lots of strangers traveling the railroad track. I have seen lots of hoboes. I used to feed quite a few.

Q. Both going and coming? A. Yes, sir.

Q. I don't mean hoboes. I mean people who can live, who are self-sustaining.

A. Yes, sir, the general public generally travel the railroad track.

(Testimony of Thomas Fox.)

Q. Do you know anything about the employees of the foundry traveling across and upon that track, between Wilsonia and Oswego?

A. They cross it. Between the two stations there's about four paths that comes up from the foundry, that the working men crosses backwards and forth. There is one right at Wilsonia, and there is one right about where this boy got hurt, and there's two between that and the depot—between Oswego depot.

Q. Are the people who work in the mill, in the foundry, obliged to cross the track to and fro?

A. Yes, sir.

Q. Where this boy got hurt, you say there is a path?

A. Yes, sir, right close to where he got hurt.

Q. Well, now, where does that lead to?

A. It goes to the foundry, and up into Oswego, up where I live, up in what is called the New Town part of Oswego.

Q. Does it lead directly across that track?

A. Well, I don't know as it goes right directly. Pretty near it, though.

Q. What I mean to inquire is, people in crossing that track, would they cross straight across, or would they go down the track a little ways and then cross?

A. Pretty near straight across where that path is.

Q. That leads up near where you live?

(Testimony of Thomas Fox.)

A. Yes, up the street north of me.

Q. And where people live generally who work in the foundry?

A. Yes, there's a good many people live up in there that works in the shops.

Q. About how many people work in the foundry?

A. When she runs full blast, there's between 60 to 75 men employed there.

Q. Is it running full blast a large part of the time?

A. Yes, sir.

Q. About how much of the time?

A. Oh, I couldn't say.

Q. That is, approximately, as near as you can state?

A. I couldn't say that. I don't work there. I don't keep—They have been running quite steady for a while. They shut down sometimes for a couple or three months, and **then they run six or eight months**

Q. That has been the condition for a number of years, has it not?

A. Yes. Sometimes shut down longer than that. I couldn't say, as far as that is concerned.

Q. Where do you live now, Mr. Fox, with reference to where this boy was hurt?

A. I live in the neighborhood of 800 feet right due west.

Q. Directly west?

(Testimony of Thomas Fox.)

A. Yes, right straight up west of where he was hurt.

Q. Is that ground platted? Is it laid off in lots?

A. On the west side of the county road, it is.

Q. How far is this county road from the railroad track?

A. Where he was hurt?

Q. Yes.

A. Well, I would judge it is 200 feet—close to it. It may be a little more or a little less.

Q. It zig-zags, doesn't it? It is not directly parallel with the road, is it?

A. No. When it gets down to Wilsonia, it is closer to the railroad at Wilsonia than it is up there.

Cross Examination.

(Questions by Mr. FENTON.)

Mr. Fox, what is the distance from Wilsonia up to Oswego station by the county road?

A. Well, if them electric light poles is 100 feet apart, what they are supposed to be, it is 1400 feet.

Q. What is the distance from where your place was, where you lived before you moved where you live now, by the county road up to Wilsonia?

A. Up to Wilsonia?

Q. Yes.

A. Well, I lived down on the river bank. It was about 600 feet from the house I lived in up to the railroad, and it was about, from where you come onto the railroad track, something like about 500 or 600 feet up to Wilsonia station.

(Testimony of Thomas Fox.)

Q. Now, how far was it from the point where you went onto the track up to the county road?

A. Where I went onto the track?

Q. Yes. You came up from the river, where your house was, about 600 feet from the track, and struck the track?

A. Yes, sir.

Q. Now, suppose you wanted to go to the county road. I assume there is a path right up to the county road from that point?

A. We went right off the railroad track—it wasn't but a few steps to the county road; and then we went down and crossed a bridge.

Q. And came south?

A. And then went south; but then just as quick as we got across the bridge, we had a path that we turned right off, and went back onto the railroad.

Q. I understand. Well, now, I want to ask you this question: How far was it from where you could have gone to the track of the company at the point where you first struck it onto the county road—the little path. You said it was close—how far was it?

A. From where I come up onto the track from the ranch?

Q. Yes, over to the county road, by this little path that led up to it, or down to it.

A. Well, there was a regular road. It was not a path at all. I had a wagonroad that went right in. We come right out the wagonroad from the ranch.

(Testimony of Thomas Fox.)

That is, we come up on the inside of the fence on a path, and we crossed over the fence on a pair of steps, and then we struck the wagonroad right at the crossing of the railroad track, and if we was going to go—generally if we was going the county road, we would keep right around the wagon road.

Q. So if you wanted to, you could follow the county road, where it crosses the track north of Wilsonia, and go right on up to Wilsonia? A. Yes.

Q. Now, what would be the distance that way?

A. What would be the difference? Well, you went over a hill, and up a rough road.

Q. I understood you to say that had been macadamized, and was a hard-surfaced road, and had been for the last eight years?

A. Yes, sir. But in the winter time it is more or less muddy and wet, and anybody would suppose you would take the levellest road. You would not climb a hill if you could get out of it.

Q. That is, it was a matter of convenience; to keep people from walking in the mud, they would walk between the rails, on the ties, and go up to Oswego, or go the other way if they wanted to?

A. Go either way; it was up to them, if they wanted to go.

Q. Well, now, if you had seen any warning sign there to keep off the track, you would not have paid any attention to it?

(Testimony of Thomas Fox.)

A. I don't know as I would.

Q. Well, don't you know you would not?

A. I wouldn't say whether I would or would not. There is a warning sign across—I used to walk across Elk Rock trestle before they put any sign across there, but since they put one, I have not walked across it.

Q. You were afraid you might break down?

A. Not a bit of it. I could get off all right.

Q. Don't you know, Mr. Fox, that people along the vicinity of a railroad track will walk between the rails, on the railroad track, and take all the chances of the trains coming and going, rather than walk in the county road that may parallel it, if the road is a little muddy?

A. Oh, of course, that would be natural; a person would take the easiest—take the road.

Q. Don't they do that habitually?

A. A person would take the road they would rather walk.

Q. Don't they do that habitually, wherever they can?

A. I couldn't say.

Q. Hasn't that been your observation?

A. I know the people walk that railroad track in preference to the county road.

Q. They don't expect the cars to get off the track when they come along, do they?

A. No; no.

Q. You go with the idea that you will get out of the way if a train comes: is that it?

(Testimony of Thomas Fox.)

A. I suppose a man wouldn't stand there and be run over.

Q. And the reason you told your children not to walk the trestle is because you think it would be safer to walk on the county bridge? A. Yes, sir.

Q. You understood that the train might come and catch them? That is the only reason? You have noticed people walk the other way from where you first strike the railroad track, going north towards Portland, towards Elk Rock, haven't you? A. Sir.

Q. You have noticed people walk on the tracks, going north, haven't you?

A. They used to, yes; but since they put up the notice not to walk across the Elk Rock trestle, I never seen so many travel. They take the county road, because there is a watchman down there that won't let them cross.

Q. Well, then, it isn't the notice, but the watchman, that keeps them off?

A. I dont know about that.

Q. Between Wilsonia and Rock Spur, don't you see people tramp along there on the track?

A. People live along there on the track, and travel it. It is about the only way they could get to travel.

Q. Now, then, you spoke about a path coming onto the track somewhere near where this young man was hurt. That path leads from the foundry, doesn't it?

A. And the river.

(Testimony of Thomas Fox.)

Q. And the river? A. Yes, sir.

Q. Now, did you notice a little foot bridge down there alongside of the water-pipe, where the company gets its water—I mean the Oswego Iron Works' water-pipe? A. There is two.

Q. Where are those little foot bridges that are on this path?

A. They are on the side of the depot, the Oswego depot.

Q. They are not on the right of way of the company, are they?

A. No, I don't think so.

Q. They are on the land of the Iron Works?

A. On the Oregon Iron & Steel Company's land.

Q. There isn't any little culvert or ditch leads right onto the track or right of way of the company, is there?

A. I couldn't say whether they was on the right of way. They was on there before this new right of way was surveyed.

Q. About how far away from the tracks where the man was hurt is it to where this little trestle or culvert that he talks about is?

A. One to take him across from the foundry?

Q. Yes.

A. I suppose that is the one down by the pump house.

Q. How far is that? That is about 175 feet, isn't it, away from the rails? A. Where?

(Testimony of Thomas Fox.)

Q. That little trestle or bridge, or whatever you call it.

A. There is nothing only a couple of planks across there.

Q. I understand, with a railing on one side and a big pipe on the other, and a couple of boards laid down for them to walk on. Now, that is about 175 feet away from the railroad isn't it, towards the river?

A. No, I wouldn't judge it was that far.

Q. Well, about how far? A. Well, 100 feet.

Q. At least 100 feet?

A. I don't know whether it is hardly that or not—one of them. One of them is a little further away than the other. It may be further; it might not; but I wouldn't judge it was. ..

Q. I show you a picture which, for the purpose of identification may be marked "Defendant's Exhibit 2," and will ask you if you recognize that as the board walk, pipe line, and railing that you refer to, that this young man and his companion crossed over to come up to the tracks of the company at the time of this accident.

A. No, sir, I don't recognize that at all.

Q. Never saw it before?

A. I might have saw it, but it don't look like it to me in that picture.

Q. You cannot recognize this train up there on the track?

(Testimony of Thomas Fox.)

A. Well, it may be the train up there on the track ; but as far as that walk is concerned, I don't.

Q. You never saw that before ?

A. I might have saw it, yes, but it don't look natural on there to me.

Q. Well, now, will you just describe to the jury the walk that you have in your mind that is there ?

A. That there walk, I would take that walk to be down next the Iron Company's track.

Q. You can describe the one you saw.

A. Let's see that again.

Q. That is the nearest one to the track—purports to be the nearest one to the railroad track. Now, do you recognize it ?

A. No, sir.

Q. Now, you describe the one that is nearest to the track, as you remember it.

A. The one that is nearest the track is across the water ditch. It is nothing but a couple of board laid down.

Q. Well, now, I am speaking of the one that is on the track that these young men came up on, at the time they claimed to have got onto the track where the young man was hurt, and the one that is nearest to the railroad track, which you say is about 100 feet or less ?

A. Well, that is across the water ditch, the one that I mean. But then there is another foot walk down the hill further, where they come up over the

(Testimony of Thomas Fox.)

Oregon Iron & Steel Company's railroad track, that runs into the foundry, before they get up to this water ditch.

Q. I will show you, then, another photograph, and ask if you recognize that as the walk nearest to the foundry on this so-called path?

A. Is that the railroad track up at Oswego, or is it the Oregon Iron & Steel Company's track?

Q. That is the Oregon Iron & Steel Company's track.

A. That is where I wouldn't think it was up at the station.

Q. No, that is the Oregon Iron & Steel Company's track.

A. That is where they come off, they come over that track and come on up, and across the water-ditch up above that.

Q. Across the pipe?

A. No, there ain't any—yes, there is a pipe.

Q. Isn't that a pipe?

A. There is a pipe that runs from the water-ditch down to the pump. But where these foot paths crosses this ditch, there ain't no pipe. The pipe comes up here to the end of this ditch, and there it is fed; that runs down to the pumping house.

Q. You noticed a walk there with a railing on one side, didn't you? A. Yes, sir.

Q. Was that one of the walks you refer to?

(Testimony of Thomas Fox.)

A. That looks like the one that is down next to the Oregon Iron & Steel Company's track.

Q. Well, now, then, doesn't this look like the one that is nearest the railroad track?

A. The steps there—I would say that was steps; but if that is there at all, that is along the pipe line; but they don't go over that at all, only men that attends to the pipe line, I don't think.

Q. They don't use that to go up to the railroad track? A. No, sir, I don't think so.

Q. Where is the other path that they come up to the railroad track on?

A. When they cross that bridge, that little walk there, the path forks—one goes straight up the track, and the other turns a little toward Oswego depot, and they go up a pair of steps up onto the Southern Pacific track.

Q. That is to say, there is a little walk about 100 feet from the company's tracks?

A. After you cross over this.

Q. You cross over that, and one of the paths goes straight across the right of way and tracks of the company, and the other turns up, and goes up towards Oswego?

A. Yes, sir. One path, you cross this little piece—I wouldn't say what the distance is; they fork there, and one goes south towards the depot, and the other goes pretty near straight up the hill. You

(Testimony of Thomas Fox.)

cross the track on the north side of the depot a little way.

Q. You speak of the Oswego depot?

A. Yes, sir.

Q. Now, this path that crosses about where this young man entered upon the track, as you understand it, goes across the track and up the hill?

A. Yes, sir.

Q. And then the other path forks a little back of the company's right of way, and turns off and goes to Oswego?

A. This goes up a pair of steps up onto the railroad track.

Q. Suppose a party wanted to go from the foundry, or the barn down there, to Wilsonia station, how would he go?

A. Well, if I was going to go, I would go a different path to either one of them.

Q. Well, which way would you go?

A. I would go down north.

Q. Would you follow the track of the Oregon Iron & Steel Company?

A. No, I would go across on a plank walk there is across that little creek down there below, and I would take the path that runs up and comes into Wilsonia.

Q. How far north of where these boys crossed coming up the hill would that path be?

(Testimony of Thomas Fox.)

A. Oh, quite a ways.

Q. Two or three hundred feet—or two or three hundred yards?

A. After they leave the foundry a piece, the road forks. Instead of coming up towards Oswego, there is one turns towards the north.

Q. So that if a man wanted to go to Wilsonia, he wouldn't go the way these boys did?

A. Oh, it is just—

Q. Just answer that question now.

A. Well, I will tell you—a man that was acquainted wouldn't. I wouldn't, I know—a man that was acquainted wouldn't go that way. But after night, I don't know but the other road is the best road to travel.

Q. That is, if he was going to Oswego in the night, he would go the way these boys went, would he?

A. It is the best road, the way they went.

Q. To go to Oswego?

A. Yes, sir.

Q. That would be the natural way, unless you took the path that forked off a little further south of where they did?

A. North, you mean.

Q. No, to go to Oswego?

A. Oh. Oh, yes, you would go up the steps, and come up to the depot, pretty near right up to the depot.

Q. If you were going to Oswego? A. Yes, sir.

(Testimony of Thomas Fox.)

Q. But if you went up to the track where this boy did, that would be one of the ways to go to Oswego, but it would not be the way that you would take to go to Wilsonia? Now, answer that question.

A. Well, as I said before, it would be owing to circumstances. If it was in the night, I might go that way, because it is the easiest road to travel. But if I was going to go to Wilsonia, I would take the other road, because you would save 300 or 400 yards; that is all.

Q. You would save how many yards?

A. 300 or 400 yards.

Q. If a man was pretty well acquainted out there, he would know which way to go, wouldn't he?

A. Yes, certainly would.

Q. If he had been there three or four times, and went in the neighborhood, he would know how to go, wouldn't he?

A. Well, I don't know as he would. If a man ain't in there more than three or four times, never was down in there to work, I don't know as he would know.

Q. If he had a man with him that was working there, and working there right along, he would probably know which way to go, wouldn't he, if it was night?

A. I don't know. I couldn't say.

Q. Now, this path that you speak of that enters

(Testimony of Thomas Fox.)

on the right of way the way those two young men did, that path crosses the track and goes up the hill, is used by the men that sometimes work down in the foundry to go to their homes in the New Town?

A. You mean the one that goes down there?

Q. Yes, the one these boys came up on?

A. Yes, it is used every day by the foundry men going back and forth.

Q. It is not used very much at night as a crossing, at 10 o'clock?

A. I couldn't say about that.

Q. Don't you know, as a matter of fact, that it would not be?

A. I know this, there ain't a great deal of night work done down there; but I don't know who crosses that track in the night.

Q. I know, but these men that do cross, that we have had crossing there frequently, are the men that cross in the day time going to and from their work?

A. Yes, sir.

Q. And at 10:45 at night, there are not many people that cross that track going up to their homes?

A. No, I suppose not.

Q. From the place where they had been at work during the day time?

A. They don't work at night. I don't see what business they would have down there after night.

Q. There is no night shift down there?

(Testimony of Charles N. Haines.)

A. No, sir, not to amount to anything. Sometimes on repairs they have a few men working. They don't run of a night.

Q. So if a train was coming along there at 10:45, they would not expect to find many men there, would they, crossing the track?

A. No, I don't suppose they would.

(Excused.)

CHARLES N. HAINES, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

What is your full name?

A. Charles N. Haines.

Q. Where do you live, Mr. Haines?

A. Oswego.

Q. Have you a family? A. Yes, sir.

Q. How long have you lived there?

A. Since 1881.

Q. Been there practically all your life?

A. A pretty good part of it, yes, sir.

Q. Are you in business in Oswego? A. Yes, sir.

Q. What business are you engaged in?

A. Confectionery.

Q. Are you familiar with the surrounding country there about Oswego?

A. Yes, sir.

(Testimony of Charles N. Haines.)

Q. Are you familiar with the railroad track of the Southern Pacific Company from Oswego to Wilsonia?

A. Yes, sir.

Q. Now, you may state whether or not, if you know, people travel that track generally, as a public thoroughfare.

Objected to as calling for a conclusion.

Question withdrawn.

Q. To what extent do the people use that as a thoroughfare, if you know?

A. People use it as a thoroughfare in preference to the county road. They use it as a general thoroughfare, pretty near. I see people there—I have seen them get off the train, and going down that way towards Wilsonia. Instead of going out on the road, they will take the railroad track nearly every time, in preference to taking the county road.

Q. And walk back from Oswego to Wilsonia?

A. Well, I don't know as they walk to Wilsonia. Probably some of them—they are pleasure seekers—I notice them every Sunday in the summer time. And they get off the train, and then they go north toward Wilsonia instead of taking the county road. Sometimes they get down part of the way, and then they get down over the hills, have their lunch; they go down there on the river-bank, they go down, take different ways down, and go down, take their lunches down there and have their picnics.

(Testimony of Charles N. Haines.)

Q. Do they go past Wilsonia?

A. Well, sometimes they do. They go down past Wilsonia, and right down over into Trine Creek. They have lots of water and shade there, and they have their little picnics down there.

Q. What about people living north of Wilsonia—I am speaking now of the residents of the town—do they travel it?

A. North?

Mr. FENTON.—Just a moment. I don't know that there are any living in the town north of Wilsonia.

Mr. LATOURETTE.—I meant to have said south. Thank you for calling my attention to it.

A. South of Wilsonia?

Q. Yes, up towards Oswego. In other words, do you know whether or not the inhabitants and citizens of Oswego use that track generally?

A. Yes, they use it every day. I use it myself. I take the track in preference to the road lots of times in the summer time when I go down there. The men working down there, if I would have business down at the bridge-gang, why I would take the track in preference to taking the road.

Q. Did you work for the company?

A. Southern Pacific Company?

Q. Yes.

A. Not for about twelve years—thirteen—I used to work for them.

(Testimony of Charles N. Haines.)

Q. What is the condition of the track between the rails? Is it smooth or rough?

A. Well, I don't know as you could call it very smooth, but it is filled in with ballast up level with the ties. It is rock that is used in the ballast, but then they had a path—there was a path beat in between the rails. You could see where they had used it to walk. And there is a path alongside of it on the west side. There is a path—had a little slope to it in places; but there was a path the full length from—well, pretty near from the station down to Wilsonia.

Q. How long had that path been there?

A. It has been there for years—been used for years.

Q. Ever since you can remember?

A. Ever since I can remember the road being there, it has been used.

Q. What is that?

A. I say, it has been used since I can remember the road being there.

Q. Is there a county road that is running parallel with the railroad track?

A. Well, yes, it is parallel—you might say it is parallel. There is a little curve in it, but it is pretty near parallel.

Q. Is that used very much—the county road—by pedestrians who live in and about Oswego?

A. Well, not a great deal. It is used some. I

(Testimony of Charles N. Haines.)

used it myself sometimes, use that in preference to the railroad; and lots of times I would take the railroad—most of the time I would take the railroad if I was going down that way. If I would happen to be down at the station, I would take the railroad instead of the county road.

Q. What about other people, as far as you have observed?

A. I have observed more people use the railroad than I did the county road.

Q. The use of which you speak, do you mean to say that it has been used from Oswego to Wilsonia, the entire distance from Oswego station to Wilsonia station?

A. Yes, sure it has.

Q. How many paths are there crossing the track between the foundry and what you might call West Oswego?

A. Between the foundry?

Q. Yes. No, I mean between Wilsonia and Oswego station?

A. Four that I can remember of now. Four that I am positive of.

Q. Are those paths used generally by the people who work in the foundry and pass to and fro?

A. Yes, sir.

Q. From their homes to their place of work?

A. Used by the men working in the shop.

Q. How long have those paths been there?

A. I don't know. I put in about eight years down

(Testimony of Charles N. Haines.)

there, and I used them myself that long. I don't know—ever since the foundry has been built, because they have no other way to get to and from Oswego, except to cross the track on these paths; and two roads—there's two roads, one just above the station and one at Wilsonia station. That is, I think—I am not positive—that they use that road now; but there used to be a road there, cross and go in a gate, and go down past a pump-house, over to the foundry. Whether they use that or not, I don't know.

Q. You mean a wagon road? A. Yes, sir.

Q. People generally travel these trails, though, do they not?

A. They generally travel these trails.

Cross Examination.

(Questions by Mr. FENTON.)

These trails, Mr. Hains, across the tracks and right of way of the company, are used by the men to go to their homes up above the track in Oswego?

A. Yes, those men use them there; and then people who are going down to the foundry—visitors.

Q. Would cross over?

A. They have to use them, too, yes, sir.

Q. You say you have noticed a good many people travel on this railroad track, between the rails, from Oswego to Wilsonia. Haven't you noticed people go on beyond Wilsonia, on towards Rock Spur.

A. Yes. I have done it myself.

(Testimony of Charles N. Haines.)

Q. Then, there is no particular generally beaten path that people go from Oswego to Wilsonia specially, is there?

A. Well, the path that seemed to be worn more there, because most of them, when they go down there they would just go down over to Trine Creek, and down that way.

Q. They would go on below Wilsonia a little ways, and go down the hill to Trine Creek, where they would have their picnic?

A. Yes, sir.

Q. The only reason they would go to Wilsonia was because they wanted to get a picnic ground—something of that kind?

A. I don't know as to that, but that is the way they went.

Q. You don't want the jury to get the impression, do you, from your testimony, that there is a well-defined road, where the public travels more than they do anywhere else, between the depot at Oswego and the depot at Wilsonia, on the track? You don't want the jury to understand that is what you mean?

A. I want them to understand that that there path was between them rails, and was very plain to be seen. It was traveled by foot passengers.

Q. And people can travel there?

A. They can, and they do, yes.

Q. And there is nobody there to throw them off?

(Testimony of Charles N. Haines.)

A. No, sir, nobody to throw them off.

Q. Now, as a matter of fact, you never saw very many people travel along there at 10:45 at night, did you?

A. Well, I tell you I never was down that way at 10:45 at night. I couldn't see them.

Q. You never knew many of these employees, that quit at six o'clock in the evening, traveling down there at 10:45?

A. Well, no; unless they had a breakdown, and some of them were working there to fix it up.

Q. Then they would cross the track?

A. I suppose they would.

Q. They wouldn't go down to Wilsonia?

A. Some of them would go around that way. They live in different parts of the town.

Q. But they would cross the track?

A. They would cross the track.

Q. They wouldn't have occasion to travel between Oswego and Wilsonia between the rails?

A. I don't suppose they would. Some of them could make it that way, if they wanted to.

Q. Certainly, if they wanted to go out of their way. Some of them could go down to Elk Rock and back again, but they wouldn't?

A. I don't suppose so.

Q. These paths that so much has been said about are paths used by the workmen going to and from their work?

(Testimony of Charles N. Haines.)

A. The ones leading to the foundry, yes.

Q. And the travel that you speak of is for the convenience of somebody that is trespassing on the track, going back and forth wherever they want to go?

A. I suppose they call it trespassing. They never had notices to keep off, to keep them off.

Q. You don't have notice to keep out of a man's house, do you?

A. No, sure not.

Q. You don't have to have notice to keep out of a private barn? A. No.

Q. You know, and everybody else knows that railroad track the moment you get on it, don't you?

A. Yes, sir.

Q. It is not intended for travel by foot passengers? A. I don't know about that.

Mr. LATOURETTE.—It seems to me this is mere argument on the part of the attorney.

Mr. FENTON.—The law is the railroad track is a place of warning without any notice.

Mr. LATOURETTE.—You can talk that to the court.

COURT.—Go on.

Q. You know when you get onto that track, you are going with the idea it is to be operated by the railroad company, that moves trains over it?

A. Of course, I knew it.

Q. If you were going along there at ten o'clock at night, you would be looking out for trains?

(Testimony of Charles N. Haines.)

A. Yes, sir, I have. I have been along there myself, but I always look out for trains.

Q. You would get off the track if the train is in sight?

A. I would certainly. If I saw it, why, I would get off. That is a cinch.

Q. You wouldn't expect the train to stop or flag you?

A. No, I wouldn't, unless they would catch me on a bridge somewhere.

Redirect Examination.

Q. Mr. Hains, you say they break down sometimes in the night there? A. Yes, sir.

Q. Or have over-work in the foundry. And in those cases, do you know what the custom is about quitting—the time of night that they have to quit?

A. Why, no, I don't. It all depends on how much of a breakdown they have. Sometimes I have known them to work all night, and I have known them to work till midnight, and different hours of the night.

Q. Is there more or less work down there evenings, of that kind, quite often?

A. Well, probably.

Mr. FENTON.—He says he doesn't know how many breakdowns they have.

A. Once or twice a month. Maybe once a month. I have known them to happen oftener—sometimes oftener than that.

(Testimony of Charles N. Haines.)

Q. Do you know where this plaintiff was injured?

A. Sir?

Q. Do you know about the locality where this plaintiff was injured—Evans?

A. Yes, sir, I have been shown the place.

Q. Now, is that near one of those paths that you speak of, that cross the track?

A. Yes, sir.

Q. How close is it to that path, or is it right on the path?

A. What do you mean? Where he was hurt?

Q. Yes.

A. Well, as near as I can learn—I have been shown—it is pretty close right onto the track.

Mr. FENTON.—If the Court please, this witness does not know where the man was hurt. It has been pointed out to him. The plaintiff himself testified that he went down the track a distance—I don't remember the distance—over 200 feet, I think; so that that must fix it.

Mr. LATOURETTE.—I don't want anything except what he knows. That is what I am trying to find out.

Mr. FENTON.—He only knows by hearsay where this man was hurt. That is the objection I make.

Q. Look at defendant's exhibit 1, and observe the point on that track about where that man is standing.

A. Well, as near as I can tell, the path crosses

(Testimony of Charles N. Haines.)

right just at the lower end on this side—right down in here somewhere.

Q. Right near where that man is standing?

A. Yes, sir, right down in there, near somewhere.

Q. Near where that man is standing in the picture?

A. It is right in near somewhere where that man is standing, where that path comes, right up close in here, crosses and goes up here—turns.

Q. Is that the most northerly path crossing the track between Wilsonia and Oswego?

A. No, sir.

Q. Is there another path still between that?

A. There is one down pretty close to Wilsonia.

Q. So that would be the second one of the four paths that you referred to?

A. From Wilsonia, yes, it would be the second.

Recross Examination.

Q. This path that leads near Wilsonia, where does that go from the barn? A. From the barn?

Q. Yes.

A. At the pipe foundry—the pipe foundry barn?

Q. Yes.

A. Well, that goes down over the hill, and then it turns to the left. That forks again, and it turns to the left, and goes down across Trine Creek, and then goes down and crosses another little creek, across a foot bridge. There's three or four different ways that path leads to.

(Testimony of Charles N. Haines.)

Q. If a man wanted to go from that barn to Wilsonia station, which way would he go naturally in the night time?

A. Well, in the night time, if a man knew the country, why, he could go, after he come down, come west a little from the barn, and turn north, and then to go north, oh, 200 or 300 yards, and then hit this trail, and go right up to Wilsonia.

Q. If a man was living there and working there at the barn, and had been some time, and was with a man that had been there several times, and wanted to go to Wilsonia station, that is the way they would go, isn't it?

A. Well, if he was acquainted with the paths, he would go there.

Q. Especially if he had heard the train switching up there, and wanted to take the train?

A. Well, that would depend. I would go that way if I was there myself, because I know the country so well there.

Q. This path coming up to the track at the point south of where you understood this man was hurt, which enters upon the track, we will say about 200 feet south of where the man was picked up, that is the path either to go across the track up the hill, or to go to Oswego, isn't it? A. Yes, sir.

(Excused.)

(Testimony of Roy Fox.)

ROY FOX, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

Mr. Fox, what is your age?

A. 20 years the 18th of last March.

Q. Where do you reside? A. Oswego.

Q. Your occupation? A. Teamster.

Q. How long have you resided in that vicinity?

A. 20 years the 13th of last May.

Q. Raised there? A. Yes, sir.

Q. Are you familiar with the Southern Pacific Railroad right of way between Wilsonia and Oswego? A. Yes, sir.

Q. How long have you been familiar with that road? A. As long as I can remember.

Q. How near do you live to it?

A. At present live about 800 feet due west of where this boy got hurt.

Q. How far from Wilsonia?

A. About 1000 feet southwest.

Q. Southwest how far?

A. About 1000 feet southwest of Wilsonia.

Q. That is your home there? A. Yes, sir.

Q. How long have you lived in that place?

A. January, 1905.

Q. To what extent has the railroad track and

(Testimony of Roy Fox.)

right of way between Wilsonia and Oswego been used by the public as a means of travel—roadway?

A. Well, about 90 out of 100 will travel the railroad. Very seldom see one travel the wagon road.

Q. That is foot passengers or pedestrians?

A. Yes, foot passengers.

Q. What is the condition of the track in between the rails as to being smooth and passable or not?

A. Well, I have always found it a pretty good foot-path, day or night.

Q. Is it ballasted with gravel?

A. No, sir, it is ballasted with dirt. There is some rock in it; once in a while would be a rock that would stick up out of the dirt. There is a beaten path.

Q. How far back has the track been in that condition, to your knowledge?

A. As long as I can remember.

Q. What class of people travel over that track from Wilsonia to Oswego on the railroad right of way?

A. Everybody. There ain't no class at all—the public generally travel.

Q. Is there any sidewalk between the two towns—the two stations? A. Between where?

Q. Between Wilsonia and Oswego? A. No, sir

Q. There is a county road up on the hill?

A. There is a county road, yes.

(Testimony of Roy Fox.)

Q. But there is no sidewalk?

A. No sidewalk.

Q. Have you seen people traveling night and day?

A. Yes, sir.

Q. All times of day and night?

A. Yes, sir. I have traveled it myself.

Q. Sir?

A. I say, I have traveled it myself that way.

Q. Do you know whether or not the railroad company and the agents there knew of this travel?

A. Yes, sir: I have met section foremen, and I have met bridge carpenter foremen, and I have met the agent, and talked to all of them right on the track—held conversation with them.

Q. Never been any cattle-guards or trespass notices?

A. Never have since I can remember anything about it.

Q. How many paths, to your knowledge, have been used running from the Iron Works up across to the residence part of the town? A. Four.

Q. Between Oswego and Wilsonia?

A. Four of them.

Q. Have those paths been used generally by the workmen? A. Yes, sir.

Q. Going to and from their homes to work?

A. Yes, sir.

(Testimony of Roy Fox.)

Q. Has there been any other way for those people to get forth and back from their work to their homes?

A. No, sir, not the ones in New Town, they couldn't get out of it no way to go across the track. They would have to cross the track some place or other to go to work.

Q. I show you Defendant's Exhibit 1, which purports to be a photograph of that right of way, and call your attention to a man standing down on the track, and will ask you, if you know, whether one of those paths crossed that right of way at about that point?

A. Yes, sir, right—it is just—it looks about ten feet south of where them fellows is standing, that path.

Cross Examination.

(Questions by Mr. FENTON.)

Mr. Fox, you are the son of Thomas Fox?

A. Yes, sir.

Q. One of the witnesses. And you did live down towards the river, beyond Wilsonia? A. Yes, sir.

Q. Several years ago, until 1905? A. Yes, sir.

Q. You were born down there, weren't you?

A. No, sir, I was not.

Q. Well, you used to come up from that place, up to the railroad track, go right across the county road at the railroad crossing, and cross the bridge coming towards Oswego—a county bridge—and then get on to the railroad track?

(Testimony of Roy Fox.)

A. No, sir, we walked the railroad track up to the end of the bridge, and there was a trail went down on the county road to the bridge. As quick as you got across the bridge you turned to your left, came right back onto the railroad track again, just about 50 feet north of Wilsonia.

Q. And that you did, under the direction of your father, as a schoolboy?

A. Never had no directions. I was never ordered off there.

Q. He never told you to get off the track?

A. No, sir.

Q. He never told you to get off the trestle?

A. He told me not to travel the trestle. I never traveled the trestle until I got old enough to kind of take care of myself.

Q. He didn't tell you to look out for the train, did he?

A. No, I knew enough to get out of the road of the train if I saw it coming.

Q. You didn't travel along there at ten o'clock at night, did you?

A. Yes, sir, I have; passed this train many times right where this boy got hurt.

Q. Did you get off the track?

A. Yes, sir, I have, because I knew it was coming.

Q. You can hear a train there pretty well, can you?

(Testimony of Roy Fox.)

A. You can right where he got hurt; but you get 100 feet south, you can't.

Q. Where he got hurt, you could hear it very well? A. Not very well.

Q. What is the matter?

A. Oh, you come right around a high curve, ten or twelve feet high. You can't see light or anything else.

Q. If there had been a light on the end of the car he could not have seen it? A. No, sir.

Q. It would not have done him any good?

A. No, sir.

Q. It was a dangerous place for a man to be on the track, wasn't it?

A. If a fellow didn't know what time the train was coming, it would be, yes.

Q. If he couldn't see the end of the train with a light on it, on account of that curve, ten feet ahead of him, it would be a pretty bad place for a man to be, wouldn't it?

A. Yes; but just about 100 feet from where this boy got hurt, there was a whistling signal, and they generally whistle there.

Q. If a man was within ten or fifteen feet of a train after it left Wilsonia, at the point where this boy was hurt, he would be in pretty bad shape, wouldn't he? A. What is the question?

Q. I say, if a man was where this boy was hurt,

(Testimony of Roy Fox.)

and the train was coming from Wilsonia and got up to that curve, where he could not see anything, could not see man or light or anything else on the end of the car, he would be in a dangerous place?

A. Yes, train backing up without headlight which you could see up on the bank after you got up to where he was.

Q. Could you see the reflection of the headlight on the bank?

A. You could with a headlight, but you couldn't with a common lantern.

Q. Could you see it from where he was, could you see the reflection of the headlight?

A. There was no bank where he got hurt.

Q. But you could see the reflection of the headlight on an engine, couldn't you, with only two cars in?

A. No, you couldn't, if the cars was ahead.

Q. Couldn't you see any reflection of the headlight on an engine?

A. No, sir, you could not.

Q. What would keep you from seeing?

A. Because the engine was behind the cars. If the engine was coming with the headlight, you could.

Q. There wouldn't be any reflection on the side then, because it was backing up?

A. No, sir, there would not. The train backing up there, it is on a curve, you might say, it would be

(Testimony of Roy Fox.)

clear around behind the bend, on a bank on the left side, where the reflection would be.

Q. Don't you think there would be any reflection out of the windows of the car, or from the headlight, on the bank? A. No.

Q. It would be absolutely dark?

A. No, sir, you couldn't see no reflection on the side at all, because there was nothing there to reflect on.

Q. I see. Well, now, these paths that you speak about coming up from the foundry, you say there are four of them? A. Yes, sir.

Q. Now, if a man wanted to go to Wilsonia from the foundry, which one of these paths would he naturally take?

A. Well, it would be kind of hard to tell: not much difference in any of them.

Q. Well, now, if he wanted to go to Oswego from the foundry, which path would he naturally take?

A. Take the south path.

Q. Would he have taken the one that these young men are said to have taken?

A. Yes, sir.

Q. That would be the one a man would naturally take, if he wanted to go to Oswego?

A. Yes, sir.

Q. When he got up there, how far down the track could he see towards Wilsonia, on that path, before he

(Testimony of Roy Fox.)

got to the railroad right of way? Could he see down that way at all?

A. If he was down at the barn, he could probably see a light through the trees.

Q. One of these witnesses testified—I guess you heard him testify, didn't you, yesterday?

A. Yes, sir.

Q. Mr. Emmett—that when they left the barn down there to come up to the track, they saw the side-lights in the cars at Wilsonia, or this side of it?

A. Well, that is what I say, they might see a light through the trees there. I never was down there at the foundry at that time of night.

Q. What I am getting at is, how far from towards the track could a man walking toward the track see those side-lights in those coaches off down that way?

A. He couldn't walk over fifty feet and see them.

Q. He couldn't? A. At Wilsonia, he couldn't.

Q. Well, suppose they were towards Oswego from Wilsonia, about 400 feet, couldn't he see the side-lights before he got to the track?

A. Couldn't see the side-lights at all at the barn, 400 feet south of Wilsonia, because the office is in the road. You can't see through the office.

Q. Well, I mean on this path?

A. Well, he can see after he gets down in the bottom, he can go about 200 feet, or 300, and see the train up 400 feet south.

(Testimony of Roy Fox.)

Q. Now, counsel asked you something about the travel between the two cities of Oswego and Wilsonia. I wish you would state to the jury about the city of Wilsonia. Just tell how many people live in the city of Wilsonia.

A. Well, there is no city at all. It is just a couple of families live up on top of the hill.

Q. Couple of what?

A. Couple of families, named Wilson.

Q. Live how far away? A. Just a block.

Q. Now, as a matter of fact, the city of Wilsonia consisted of what at the time of this accident?

A. Just a station. Just a signal station there.

Q. There wasn't even a station building there at that time, was there?

A. That this happened?

Q. Yes. A. No, I don't believe there was.

Q. It was just a place—a platform?

A. Platform with a bench there, and it had a sign up, says "Wilsonia" on it.

Q. That is all there was there? A. I think so.

Q. Now, all there is there is a small station?

A. Yes, sir.

Q. Not even an agent in the station?

A. No, sir.

Q. It is a flag station, isn't it? A. Yes, sir.

Q. That is all. And there are no families living there except Wilson?

(Testimony of Roy Fox.)

A. Yes. You said how it come to be there?

Q. No, I say there are no families there, except Mr. Wilson and another family, and they are off the track quite a ways?

A. No, there are lots of families there, lives back of there.

Q. How far away?

A. They live clear back ten blocks.

Q. Yes. Those blocks are 200 feet, are they not—more than that? A. Yes, they are about 260.

Q. Now, don't you know, as a matter of fact, Mr. Fox, that A. King Wilson, an attorney of this city, went up there and bought three or four acres at this point? A. Yes.

Q. And induced the company to put a flag station there for his convenience? A. Yes, sir.

Q. And it was named after him—called "Wilsonia?" A. Yes, sir.

Q. And that that is all the city there is there?

A. That is all that I know what it was put there for, because he got it there.

Q. Now, then, these paths that cross this railroad track there, they go directly across, don't they, up the hill to the New Town of Oswego?

A. Well, some of them do, and some of them don't.

Q. Well, they go either directly across—

A. Kind of angling.

(Testimony of Roy Fox.)

Q. Or diagonally across? They don't take down the track or up the track?

A. Yes, one of them does.

Q. That one that goes to Oswego?

A. Yes, sir.

Q. That takes up the track? A. Yes, sir.

Q. So if a man was wanting to go to Oswego, why, he could go up between the rails on this path that you speak of? A. Yes, sir.

Q. That is a path made by people habitually walking between the rails there on this ballast and ties? Is that it?

A. Well, they got that all filled in and leveled off—made a regular footpath.

Q. Made it for the people to walk on?

A. I don't know whether they made it for the people, or what they done it for. It is there.

Q. I wish you would tell the jury what employees of the Oregon Iron & Steel Company, that were working down at that foundry, would come up to the right of way and take that track and go to Oswego instead of going home.

A. They are going home when they take that track.

Q. They are?

A. Yes, sir. They live in South Oswego and old town—what is called Old Town.

Q. About how many of them have you seen do that?

(Testimony of Roy Fox.)

A. Just about half of the employees at the foundry.

Q. The other witnesses said they crossed the track and went up the hill, over into the new town of Oswego.

A. That is the ones that lives in the new town that does that.

Q. Well, now, you say you saw no trespass notices there. You would have traveled the track whether you would have seen them or not, wouldn't you?

A. I don't know as I would. When I was a kid, I was pretty much of a coward. If anybody had told me to stay off, I believe I would.

Q. When you were a kid, you wouldn't have understood a trespass notice, would you?

A. Yes, I believe I would.

Q. Do you suppose if they put up a trespass notice now, you could keep the people off the track, walking back and forth, if they wanted to--picnickers and others, out there Sundays?

A. I suppose they would.

Q. You think they would all keep off?

A. I don't know they all would. Part of them would. I don't say they could keep them off, not being fenced.

Q. Suppose they climbed over the fence, how would you keep them off between the rails, if it was a nice smooth place, and outside was muddy?

(Testimony of Roy Fox.)

A. I don't believe people would climb over the fence and get in there, if they could get any other place to walk.

Q. No, if they got a place that was not muddy. You have seen picnickers come out there Sunday?

A. Yes.

Q. They would go down around the creek and have a good time? A. Yes, sir.

Q. Then they would come back on the track, and some would walk down towards Portland, down to Rock Spur? A. Some of them would, yes.

Q. Some of them would walk all the way down and across Elk Rock?

A. They won't walk across Elk Rock.

Q. They did until they put a watchman there to put them off?

A. There always was a watchman there.

Q. But he didn't have orders to keep them off?

A. No.

Q. Now he has orders to keep them off?

A. Yes.

Q. Before that they went right across, didn't they? A. Yes, sir.

Q. That is 200 feet above the Willamette River at that point, right over the river?

A. Where is that?

Q. Elk Rock—it is 200 feet above the water?

A. No, it is not that high.

(Testimony of J. T. Harbin.)

Q. How much is it?

A. It can't be much over 100.

Q. The people would walk there, and they had to have a watchman to keep them off? A. Yes, sir.

Q. How many miles is that from Wilsonia?

A. It is about a mile, the south end of it.

Q. Where would these people be going?

A. I don't know where they would be going.

Q. They wouldn't be ordinary tramps, would they?

A. Well, some of them would maybe, and some of them wouldn't.

Q. Most of them would be picnickers, or Sunday people, going from and to Portland, in the neighborhood, having a good time, walking on the track?

A. Well, I don't know whether they would be out for having a good time walking on the track or not.

(Excused.)

J. T. HARBIN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

What is your age, Mr. Harbin? A. 52.

Q. Where do you reside? A. Oswego.

Q. What part of Oswego?

A. I reside in the south part of Oswego, in the center, between the two towns, we call it. South of the depot, Oswego depot.

(Testimony of J. T. Harbin.)

Q. How long have you resided up there in that vicinity? A. Well, it will be a year in March.

Q. Where did you reside previous to that time?

A. North of Oswego, about a quarter or a little better—of Oswego depot north.

Q. How near Wilsonia?

A. Well, I should judge—oh, 1000 feet, probably.

Q. Is that over in what they call the New Town?

A. No, sir. Well, it is not any part of the town. It is on the bank of the river. We did not consider it to be in the town at all. It is on a ranch there.

Q. What is your occupation?

A. Blacksmith by trade.

Q. Are you familiar with the Southern Pacific right of way between Wilsonia and Oswego?

A. Fairly, yes, sir.

Q. How long have you been familiar with that?

A. About three or four years.

Q. To what extent has the public used that right of way as a thoroughfare for travel?

A. Do you mean from my place to Oswego?

Q. No, from Wilsonia to Oswego—the railroad right of way?

A. Well, they used that—well, as a general thing, they used it for a thoroughfare, that is, the public, afoot—walkin. I use it twice a day, as a general thing, myself.

Q. You what?

(Testimony of J. T. Harbin.)

A. I usually use it about twice a day.

Q. What condition was the walk in between the rails, from Wilsonia on south?

A. Well, it is just fair walking. There is nothing extra, nor it was not very bad. It would just be fair walking.

Q. Well, was it the best walk there was between Wilsonia and Oswego?

A. In the wintertime, it was, yes. More convenient, because the wagon-road was a hill they had to climb, and we generally avoided the hill as much as possible.

Q. Have you seen other people using it?

A. Oh, yes, frequently.

Q. How much?

A. Well, I had a kind of a boat station there, and most all the parties that come up there for Sunday dinners would go up to Oswego, and they would generally take—most everybody would take the railroad track.

Q. Well, the settlers, the people living there in homes around there, would you see them using it?

A. Well, not till just here the last two years, I saw the people that lived below there use it quite frequently, and women and their families there.

Q. During the last how long?

A. The last year or so; I should say within the last two years, since they have changed the track entirely.

(Testimony of J. T. Harbin.)

Q. Since they changed the flying switch?

A. Yes, sir; well, not the switches, but they raised the track up there, and made it more convenient. From where I lived they would practically go under the track instead of going over it—where I lived at the time they changed the track.

Q. Do you know about children going to school that way?

A. My children all went that way.

Q. For how many years?

A. Two years; two years up to last March.

Q. Two years ago last March?

A. Two years ago up to last March. It will be three years coming next March.

Q. They would go to school that way and back home that way?

A. Yes, sir.

Q. Over the track? A. Over the track, yes, sir.

Q. Has that track ever been fenced?

A. Not that I know of. I never saw a fence there.

Q. Ever been any cattle guards? A. No, sir.

Q. Or any notices or anything? A. No, sir.

Q. How long did you live down there near the river, where you traveled that track?

A. Two years.

Q. Two years when?

A. I went—it was two years ago. I moved off last February. I think it would be two years last

(Testimony of J. T. Harbin.)

February, when I moved away—when I moved off there.

Q. Two years last February?

A. I had a two years lease on the place. I went on in February, and I moved off in February.

Q. Then, immediately prior to last February for two years you were living there? A. Yes, sir.

Q. And observed this use, and your children used the track, and you used it twice a day?

A. Yes, sir.

Q. You say you are a blacksmith?

A. Yes, sir.

Q. Where did you have your shop?

A. I work in the City Water Works.

Q. What?

A. I work for the City of Portland, in the Water Department.

Cross Examination.

(Questions by Mr. FENTON.)

Mr. Harbin, now let me understand where you were living at the time you say you allowed your children to walk on this track.

A. Well, I was living out—I was living about 1000 feet north of Wilsonia.

Q. And on the river? A. On the river.

Q. Were you on a county road also?

A. No, not on the county road.

Q. How do you get to Wilsonia from where you lived?

(Testimony of J. T. Harbin.)

A. Well, I would generally, at the time of evening that I would come in, I would generally take the railroad track, that is, the trestle, walking down to my place, because I had no hill to climb.

Q. You took the trestle?

A. I had taken the trestle.

Q. How high was that trestle?

A. It is quite a high trestle, probably 100 feet, it looks to be.

Q. Railroad trestle?

A. Yes, sir, it was a dangerous trestle.

Q. Walking ties? A. Yes sir.

Q. Did you allow your children to do that?

A. Well, I forbid it, but probably they did it.

Q. They did it just the same?

A. I did it just the same.

Q. They did it just the same, I say?

A. I hardly think they did.

Q. Don't you know they did sometimes?

A. They did at first, but I put a stop to it myself.

Q. How did they get along?

A. They taken the county road, the same as I should have done. The trestle was forbidden properly, naturally, ought to have been, anyway. But that is the way I went—I took the chances.

Q. You took the trestle? A. Yes, sir.

Q. Suburban trains run over that in the daytime quite frequently, don't they? A. Yes, sir.

(Testimony of J. T. Harbin.)

Q. And run until half past ten at night?

A. 12 o'clock, I suppose.

Q. A frequent service at that time?

A. Well, we had a train something near every hour, in the neighborhood of that.

Q. Going and coming between Oswego and Portland?

A. Yes, sir.

Q. One or two coaches to an engine?

A. Yes, sir.

Q. Running every hour both ways

A. Yes, sir.

Q. Yet you would go on that trestle 100 feet high?

A. Yes sir.

Q. How long a trestle?

A. I suppose it must be 150 feet, maybe 200.

Q. You never got caught on there, did you?

A. Never did.

Q. Did you pretty nearly get caught once?

A. No, sir.

Q. Well, now then, your children would come up to the track, and then they would follow the county road west of the track till they passed this trestle; when would you let them get onto the track then?

A. Well, I never made any restrictions after they got to Wilsonia. They took the track or they took the road, as they chose.

Q. Well, now, Wilsonia hasn't been there very long, has it?

(Testimony of J. T. Harbin.)

A. Well, the station has been there since they put it in there directly after I moved down on the place there.

Q. There has been a flag station there for-about two years?

A. Yes. I think it was just directly after I moved down there.

Q. And a sign up there "Wilsonia"?

A. Yes, sir.

Q. And since this accident, there has been a little station-house built? A. Yes, sir.

Q. Where people can get on and off? If the train is flagged, they will get on. And how many families get on and off there, do you think?

A. Well, now, that is quite a common little station at the present time. I should judge one-third of the population of Oswego use that station.

Q. Mr. Wilson, of Portland here, a lawyer, went out there and bought three or four acres up the hill above this place? A. Yes, sir.

Q. And at that time there was one other family living about 700 or 800 feet away from the point, wasn't there?

A. No; there was four or five families nearly as close as Wilson at the time.

Q. How far is Wilson's house from this place?

A. Oh, it must be—I am guessing at it—probably 800 or 1000 feet.

(Testimony of J. T. Harbin.)

Q. His land comes down to the county road, doesn't it? A. Yes, sir.

Q. So he comes from his place down to the county road, and goes across the county road into this little station that is named after him?

A. Yes, sir.

Q. No town there? There is no business there?

A. Oh, no.

Q. Not even a confectionery stand?

A. It is just as much of a station for Oswego as Oswego itself.

Q. It is? A. Yes, sir.

Q. Although it is 1300 feet north? A. Yes, sir.

Q. And nothing there but a shed and a flag station? A. Yes, sir.

Q. You think as many people get on that live at Oswego as do at Oswego station proper?

A. Well, you take it New Oswego, one-half the population patronize that station.

Q. When you speak of New Oswego, that is the new part up around where Wilson lives?

A. Yes. Well—

Q. How many families?

A. It is from the depot this way. .

Q. How many families, all told, live in that new part?

A. I have no idea. I am not very well posted in regard to population.

(Testimony of J. T. Harbin.)

Q. Well, approximately?

A. I should judge it was 200, take it all through. About 150 probably patronize the depot.

Q. Well, now, you say you crossed or walked this track twice a day. What time in the day did you do it?

A. Well, I walked it of a morning, and walked it of an evening.

Q. What time in the morning, going to your work? A. When I start to work, yes.

Q. That would be about what time—seven or eight?

A. Six o'clock—seven—sometimes eight.

Q. Daylight? A. Not always.

Q. And then you would go home by six?

A. Yes.

Q. You walked it back and forth twice a day for a certain time? A. Yes, sir.

Q. That is, while you were living down on the river?

A. I didn't walk it every day, but then practically every day.

Q. You said practically every day?

A. Yes, sir.

Q. That is while you were living down there during the two years? A. Yes, sir.

Q. You had no trouble in seeing or hearing the train?

(Testimony of J. T. Harbin.)

A. No, sir. My train was very convenient to me that way. Generally the train when I got off had plenty of time to get to the depot and back and give me a chance to cross the bridge.

Q. They didnt hold the train to give you a chance to get down the track? A. Oh, no.

Q. The train ran on time just the same?

A. They didn't bother with me at all.

Q. You look out for the train?

A. I watched that part of it.

Q. How many other school children besides yours, during the two years, do you think walked—

A. I think my children—well, there was another family in there probably six months in the year that patronized the road, that had school children. That was Mr. Headrick.

Q. How many did they have?

A. I don't know—two or three.

Q. How many children did you have that went to school? A. I had ten.

Q. I mean, that went to school?

A. Four or five.

Q. Ranging from five or six up to—

A. Well, 24 or 25.

Q. I mean, that is, that went to school?

A. Some of them went to school. Some of them went to work, same as I did. But the ones that went to school, I had four attending school regularly.

(Testimony of J. T. Harbin.)

Q. The youngest child you had attending school up that track was how old?

A. Six years old.

Q. Did it go alone or have somebody with it?

A. They went together.

Q. A little boy or girl?

A. I had boys and girls both going. They all went together.

Q. You allowed them to walk that track?

A. After they passed Wilsonia.

Q. With a train going every hour each way?

A. Yes, sir.

Q. It was daylight? A. Yes, sir.

Q. Did you instruct them about looking out for the train? A. Sure I do; always do.

Q. They never had any trouble seeing the train, did they?

A. They never was bothered with it that I know of.

Q. Well, now, you have seen people travel that track north of what is called Wilsonia, have you, going towards Elk Rock? A. Oh, yes, sir.

Q. These picnickers that came up there by the river, and got dinner at your place, or picnicked and lunched there, sometimes would go up to the track, and walk back away above Elk Rock?

A. Well, no, they generally came up in a boat, and

(Testimony of J. T. Harbin.)

went back in a boat, but they would go up to Oswego to get their lunch.

Q. They didn't get lunch at your place?

A. They came up there for a camp, and went up to Oswego and got their lunch, and back home.

Q. Didn't they walk to Elk Spur sometimes?

A. Not that I know of.

Q. You have seen people walk that way?

A. That is a pretty well traveled track, that is.

Q. What I am getting at is this: People don't walk from Oswego down to Wilsonia to transact any business particularly?

A. No. I have, though, frequently started in, started to take my train of a morning and missed it at Oswego.

Q. And then you would catch it at Wilsonia?

A. Then I would catch it at Wilsonia. At the same time, I have caught it at Oswego after missing it at Wilsonia.

Q. You wouldn't run into the train?

A. Wouldn't run at the train. If it was going pretty fast from me, I might try to catch it if I could.

Q. Do you know how the path leads up from the foundry up to the track there, going towards Oswego?

A. Well, slightly acquainted with them.

Q. Have you traveled that path? A. Yes, sir.

Q. Well, now, do you know about where this

(Testimony of J. T. Harbin.)

young man got onto the right of way at the time he was hurt?

A. Not just exactly. But I know where I would have got on if I had been going the way he did; but I don't know for myself where he got on.

Q. If you had been going to Oswego, you would have gone the way he did?

A. If I had been going to the store from where he was, direct in the center between Oswego and his path, his path led direct up to the store, the one he was on.

Q. The one he went up? A. Yes, sir.

Q. If you had been going to Oswego to take the train?

A. I would have taken the route to the south.

Q. You would have come up the path he came, wouldn't you? A. Yes, sir.

Q. But if you heard the train was down at Wilsonia, or if you were a little late and you wanted to make a run from that barn down there, you would not have taken the path that he took, would you?

A. Well, as I heard his evidence given yesterday, I will tell you how I think I would have done, if I had started over there and aimed to catch the train at Oswego, and thought it was laying at Wilsonia, I couldn't have helped taking the route he did, and I would have tried to catch the Wilsonia train.

Q. Certainly, after you started to Oswego to get

(Testimony of J. T. Harbin.)

your train, and you got up and you found the train had already been to Oswego and going north, you would have chased it down to Wilsonia?

A. I would have tried to have caught it.

Q. Just as he did? A. Yes, sir.

Redirect Examination.

Q. Mr. Harbin, do you know where those paths cross the track?

A. Yes, sir, I think I do.

Q. Four paths that have been testified to?

A. Yes, sir; there's several paths in there.

Q. Now, this New Town you speak about, and the Old Town, those are two different sections of Oswego, as I understand it? They are both called Oswego, but one is Old Town and one New Town?

A. It is all called Oswego, yes, sir.

Q. This New Town is up between what is called Oswego station and in back of that, isn't it?

A. In north of Oswego station—north and west.

Q. And between there and Wilsonia?

A. Yes, sir.

Q. And these people that work in the foundry, in crossing this track by these trails to go home, would be going to what is called the New Town of Oswego?

A. Well, yes; yes.

Q. And up in above back of Wilsonia, so that that town lies in practically between the two stations?

A. Yes, sir.

(Testimony of James E. Headrick.)

Q. Now, do you know where the trail runs from the foundry up—that is, the most southerly trail up to Oswego—do you not? A. Yes, sir.

Q. And I believe there is some steps that go up onto the right of way? A. Yes, sir.

Q. Now, if you were going as this boy started, this plaintiff, and Emmett, his companion, if you were going to Oswego, you would have taken the most southerly trail, wouldn't you, instead of the trail he took?

A. If I had been going to Oswego?

Q. Yes.

A. I would have taken the trail with the steps.

Q. Yes, so that you would not have gone the trail these boys went? A. No.

Q. You would have taken the other one, which was more to the south? A. Yes.

(Excused.)

JAMES E. HEADRICK, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. LATOURETTE.)

What is your full name?

A. James E. Headrick.

Q. And your age? A. 62.

Q. Your occupation? A. Laborer.

Q. And residence? A. Oswego.

(Testimony of James E. Headrick.)

Q. How long have you resided in the vicinity of Oswego? A. Eighteen years.

Q. Are you acquainted with the railroad right of way of the Southern Pacific Company between Oswego and Wilsonia?

A. Well, yes, I have traveled it a good many times.

Q. How long have you been familiar with that right of way?

A. Well, four years. I was down on that new bridge that was down there, as a watchman, and worked there for pretty near three years—about three years and a half—and I used to travel it every day.

Q. Have you been familiar with it for the last two or three or four years?

A. Yes, sir.

Q. To what extent do the public use that right of way as a means of travel between the two points?

Mr. FENTON.—Outside of employees, I suppose you mean?

Mr. LATOURETTE.—Yes, the public, I say.

A. Well, people generally used it, because, I suppose, the county road—it was like—myself—they would sooner travel the railroad than the county road. It was more convenient to me, and I suppose they had the same idea.

Q. Has that always, during all that time, been the better walk? A. Yes, sir.

(Testimony of James E. Headrick.)

Q. Has there been a well-beaten and well-defined pathway between the rails?

Objected to as leading.

A. It has been a leveler road. The other was quite a hill to climb over, and then we generally had it six or seven months of the year pretty muddy. And again it was a little bit nearer from Wilsonia to the other station. Just took the railroad track—at least I did.

Q. In what respect was it preferable to the county road?

A. Well, it was leveler and no mud. It was a cleaner, decenter walk.

Q. What classes of people have you seen using that right of way for travel?

A. Well, I saw most all classes—laboring men and business men, and all classes traveling the road.

Q. Now, during the last three or four years, how many men have been employed by the foundry down there?

A. Well, I don't know. I have not been there. I used to work in the foundry for several years. They used to employ about fifty or sixty men at that time, but I guess they are a little larger now; somewhere about sixty or sixty-five men up there.

Q. Now, where have those men been living?

A. Well, some of them lives in Portland. Some of them lives in Old Town, some of them in New

(Testimony of James E. Headrick.)

Town. There's three towns there, and they are kind of distributed around.

Q. What proportion of those men live up in what is called the New Town?

A. Oh, maybe a quarter of the gang. I couldn't say as to just the number, of course.

Q. What means did they have of reaching their homes from the foundry or pipe works?

A. Well, they had three or four different courses; whichever way was nearest home, they generally took it across the railroad track.

Q. Well, what kind of roads did they have to go?

A. Footpaths.

Q. Paths? A. Yes, sir.

Q. Leading in which direction?

A. Well, leading west.

Q. From the foundry?

A. From the foundry.

Q. Well, in reference to this right of way of the railroad, did they cross that?

A. Yes sir, they crossed—they had to cross to get out of there.

Q. How many paths were there between Wilsonia and Oswego station?

A. There were about four regular paths.

Mr. FENTON.—That is, that crossed the track, you mean? A. Yes, sir, about four paths.

Q. So that you have observed people going up and

(Testimony of James E. Headrick.)

down the track, and also crossing the track, every direction?

A. Oh, yes; yes; I have seen them going.

Q. During all this time. Did you ever see any school children going along the track there between Wilsonia?

A. Yes, sir. Mine has traveled it. I lived four years down there. That is, I didn't live there four years—I lived about a year and a half, my family did, down on that bottom at that new bridge.

Q. When was that?

A. It is two years ago—three years ago, we went on there.

Q. How many children did you have there?

A. Four.

Q. Going to school? A. Yes, sir.

Q. And what proportion of that year and a half did they travel this track to school?

A. Well, about nine months of the year.

Q. Every day?

A. Nine months school, and they went every day of school.

Q. Every day? A. Pretty much every day.

Q. Was that their usual, customary way of going to school?

A. Well, I think so, yes; that is, from Wilsonia. The other road was muddy, and they took the railroad track for it, just like myself.

(Testimony of James E. Headrick.)

Q. Was there any knowledge on the part of the railroad company of the use there by the public? Do you know whether the railroad men knew that the public was using that track for travel there?

A. Well, yes, they must have known it. I have talked to them on the road myself.

Q. Who?

A. Why, the railroad officials, some of them. The agent there in Oswego, he knew it. I have been there with him when he would be down looking at cars and such things as that, down near Wilsonia there.

Q. Has there been any objection or protest against that use? A. I never heard none.

Q. Ever any cattle-guards or trespass notices up?

A. No, sir.

Q. Has the track ever been fenced?

A. No, sir.

Cross Examination.

(Questions by Mr. FENTON.)

Mr. Headrick, where do you live at the present time?

A. I live in what they call Old Town.

Q. How far from the track of the company?

A. Well, it is half a mile or such a matter.

Q. And where was it that you lived when you were down there on the bridge?

A. Well, I lived in the shanties they had there for the bridge. I was watchman of that.

(Testimony of James E. Headrick.)

Q. Where was that bridge? Was it a bridge the company was constructing? A. Yes, sir.

Q. Where was that bridge from Wilsonia?

A. Well, it is north. Northeast.

Q. How far?

A. Oh, half a mile. A little over maybe.

Q. Do you mean the Beaverton and Willsburg bridge, across the Willamette River? A. Yes.

Q. Oh, that is the bridge?

A. That is the bridge.

Q. And you worked there for how long? Lived there for how long?

A. Lived there about a year and a half—my family did. When the bridge shut down, they left me there as watchman, to look after what was left there.

Q. When was that?

A. I can't just remember the dates. It is about three years ago. In November, I think they put me in there.

Q. And you continued in the employ of the company up to when?

A. Up to—well, been off and on till the last couple of months. I was back up there not more than, I guess, two months ago.

Q. Until the bridge was done? A. Yes, sir.

Q. How long were you watchman in charge of that Beaverton-Willsburg-Oswego bridge across the river? A. I was three years.

(Testimony of James E. Headrick.)

Q. Now, you had occasion, when you were there as watchman, to go up to Oswego frequently, didn't you?

A. Yes, sir.

Q. And as an employee of the company, you walked on the right of way?

A. Yes, sir.

Q. And while you were living there at the bridge, you had some of your family living there also?

A. Yes, sir, some of the time.

Q. And your children, some of them, went to school at Oswego?

A. Yes, sir.

Q. And how did they get onto the track first? At what point?

A. Well, there was a wagon-road—there is what they call a cart-road off the ranch, from where I lived, where the railroad crossed. It goes out, winds out across the ranch, and goes right straight out to the railroad track.

Q. Where would that be from Wilsonia—north?

A. Yes, sir.

Q. How far north of Wilsonia would that be?

A. About 300 or 400 feet.

Q. And they would get to the track the first convenient place that they could, and then they would follow the track in preference to the county road?

A. No, sir, I didn't allow them to cross the bridge. There was a trestle there—high bridge. I wouldn't allow the children to walk that. But after that, they went where they had a mind to.

(Testimony of James E. Headrick.)

Q. They had to go on the county road there?

A. They had to follow the county road till they struck Wilsonia.

Q. They left the county road?

A. They left the county road right there at the crossing.

Q. How far north of Wilsonia did they get on the track? A. About 300 or 400 feet.

Q. That is, they would leave the county road and go back?

A. Well, right at Wilsonia, right there at the station.

Q. Well, I understood you to say that they entered upon the right of way about 300 or 400 feet north of Wilsonia?

A. They did, and crossed it onto the county road.

Q. Oh, I see. They followed the county road, then, until they got down to Wilsonia?

A. Yes, sir, they crossed the county bridge, till they got down to Wilsonia, and then they went back onto the railroad track?

Q. Then they went back onto the railroad track?

A. Yes, sir.

Q. How old was the youngest of these children of yours? A. Seven years old.

Q. Did you give them any special warning about trains?

A. Yes, sir, I warned them to look out for trains on the railroad.

(Testimony of James E. Headrick.)

Q. They went to school in the daytime, didn't they? A. Yes, sir.

Q. They didn't go along there at 10:45 or 11 o'clock at night? A. No, sir.

Q. You never went along there at 10:45 or 11 o'clock at night, did you?

A. No, I was generally on duty down by the bridge at that time of night.

Q. You never was up there, traveling along there at 10:45 and 11 o'clock at night?

A. Not at that time, no, sir.

Q. These sixty or seventy men that worked down at the foundry, they didn't travel along there at 10 or 11 o'clock at night?

A. Not when I was there. I couldn't say when I wasn't there.

Q. If they had occasion to travel, they went on those paths up to their homes?

A. Yes, sir, they had footpaths to go across. They would take the path that led nearest their house.

Q. Wilsonia is just a flag station?

A. Yes, sir.

Q. Was during all this time? A. Yes, sir.

Q. And there wasn't even a shed there for people to get in under out of the rain?

A. No; that was put there about a year ago, I think; a little over, maybe.

Q. Do you know how it came to be established?

(Testimony of James E. Headrick.)

A. Well, not exactly. I have heard them say that it was through Mr. Wilson.

Q. King Wilson, a lawyer of this city?

A. Yes, sir.

Q. Bought four acres of ground up on the hill there, and built a fine home, and he wanted to be a little more convenient than to go to Oswego, so the company put him in a flag station 1300 feet north of the regular station, for his use and that of anybody else that wanted to flag a train? Isn't that right?

A. Yes, that is right.

Q. There is no business there at Wilsonia?

A. No, sir, only people getting on and off.

Q. Just a flag station for people to flag getting on?

A. Yes, sir.

Q. And if anybody wants to get off?

A. Yes, sir—accommodation.

Q. Do you know about these paths that lead up from the barn, the barn of the Oswego Iron Company down at the foundry? You know about the barn down there, do you? A. Yes, sir.

Q. Well, now, there are some paths that lead up towards Oswego, and on the track from that place, aren't there?

A. Yes, sir, there's about four.

Q. Suppose a man was down there with a companion that was very familiar with that country, at 10:45 at night, and he had a ticket that entitled him

(Testimony of James E. Headrick.)

to come back to Portland from Oswego, and he was in a hurry to get to the train, what path would he take to come up to get his train?

A. It would depend on where he wanted to get. If he wanted to get to Oswego, he would take the south trail.

Q. There are four trails, as I understand the testimony?

A. There's only two that leaves the foundry.

Q. How far do these two go up before they separate—before there is another prong in one of them?

A. Well, about two-thirds of the way.

Q. Well, then, the south path is the one they would take to go to Oswego?

A. Yes, that is the wagon-road.

Q. Now, it forks when it gets up how far?

A. When it gets up within three or four hundred feet of the track.

Q. And one track goes on to Oswego and don't go onto the rails at all? A. Yes.

Q. And the other goes right to the track?

A. Right straight to the track direct.

Q. And a man going on that path, and wanting to go to Oswego, would walk south to the station?

A. Yes, he would take the south track.

Q. That is about 600 feet from the place where it enters on the track?

A. Yes, sir, about that.

(Testimony of James E. Headrick.)

Q. And it is about 700 feet from that same point north to where *Wilsonia* is?

A. Somewhere about that.

Q. If a man wanted to leave the barn and go to *Wilsonia* station, which way would he go?

A. Well, he would go pretty near the same route, that is, in the night; I would.

Q. What?

A. I would go the same track, if it was me, in the night; for the simple reason the other trail, the one north, goes through the foundry and comes out on the back part of the building; go down over a rough piece of ground, and you have got to cross and go through the brush. I should naturally take that south trail.

Q. Now, then, something was said about a cattle-guard. Counsel asked you if there was no cattle-guard there. If there was a cattle-guard there, people walking along there might fall into, mightn't they?

A. They might.

Q. A cattle-guard is not put in there to protect people—afoot people?

A. No. I never seen no cattle-guard.

(Excused.)

THOMAS EVANS, recalled in his own behalf.

Direct Examination.

(Questions by Mr. LATOURETTE.)

Mr. Evans, I will show you Defendant's Exhibit 1, and ask you whether or not you recognize that as being a correct picture of any cut that you went through?

A. No, sir. We never went all the way through this cut. I don't remember being in that cut at all.

Q. Can you point out on this picture to the jury where you think you came up onto that track?

A. Well, I should think we came up right about in here.

Mr. FENTON.—Let him take a pencil or something and mark where he says he entered upon the track. Mark it with a cross or something.

A. (Marking the point) Just about right there. We didn't go very far before it hit me.

Q. You hadn't been on the track but a short time?

A. No, sir.

Mr. FENTON.—Let us see where he has marked now.

Q. Your pencil mark is on the east side of the track, is it?

A. Yes, sir, looking toward Wilsonia.

Q. Now, is that new scenery to you there, that picture, or did you ever see it before? This part of it I mean.

(Testimony of Thomas Evans.)

A. Yes, sir. It was a cut in here at that time. At that time it was a cut in here.

Q. It was a cut? A. Yes.

Q. And was that cut to your left or to your right as you went onto the track?

A. Well, when we went onto the track it was behind us.

Q. To your left? A. Yes.

Q. Toward Oswego? A. Toward Oswego.

Q. Now, Mr. Evans, when you went onto that track, was there anything to have prevented your seeing a light on the rear of the train. That is, on the end of the coach? A. No, sir.

Q. That was pointed towards you, if there had been one there? A. No, sir.

Q. Was there any reason why you should not have heard the bell of that engine, if it had been rung?

Mr. FENTON.—If the Court pleases, this witness went over that subject yesterday.

COURT.—I think he has been over that, Mr. Latourette.

Mr. LATOURETTE.—All right.

Q. The view from the point where you went onto the track down to Wilsonia was open and unobstructed, was it?

A. Yes. We could see ahead of us.

Cross Examination.

(Questions by Mr. FENTON.)

(Testimony of Thomas Evans.)

Mr. Evans, I understood you yesterday to say that you entered upon the track from a path which led up from the barn—

A. Yes, sir.

Q. Just a moment. And that you crossed over a trestle, or gangway, or a culvert, somewhere. Now, I would like to get that clear in my mind with reference to the cross that you have made on Defendant's Exhibit 1. Now, where was that culvert, or trestle, or whatever it was, with reference to the cross, that you have marked here on Defendant's Exhibit 1?

A. Where we come on the track?

Q. Well, where you crossed over a trestle or a culvert.

A. It wasn't no trestle on the track there at all.

Q. Well, where was it? Did you pass over a foot bridge?

A. Not on the track, we didn't.

Q. Where was it? A. East of the track.

Q. How far east of the track?

A. I don't know the exact distance.

Q. About 100 feet?

A. I should judge it wasn't any further than that. The distance I do not know.

Q. Can you describe the trestle or whatever it was that you walked over?

A. I don't know if I could. That was the first time I was ever on it.

Q. Well, do you think you would recognize it if it were shown to you in a picture?

(Testimony of Thomas Evans.)

A. No, sir, I don't know if I could.

Q. I will show you Defendant's Exhibit 2, introduced for the purpose of identification, and will ask if you recognize that as the walk that you walked up towards the track; the cars being up here. I mean these are cars now.

A. Yes, sir. No, I could not swear that that was that picture. It was dark there that night, and to swear to it, I could not swear that that was the picture.

Q. What you walked over was something like that? A. It was a bridge, yes, sir.

Q. Do you recollect there was a railing on one side of it like that?

A. Yes, if I remember, there was a railing on one side of it.

Q. And on the other side was a big iron pipe?

A. No, sir, I don't remember that pipe.

Q. It was dark? A. Yes, sir.

Q. You had no lantern? A. No, sir.

Q. Neither one of you?

A. We had when we went down.

Q. But you didn't take it with you?

A. No, sir. We left it at the barn.

Q. As you went along there, that trestle, the one which was nearest to where you entered upon the right of way of the company, or at least the tracks

(Testimony of Thomas Evans.)

of the company, you think was at least 100 feet away from the tracks?

A. That I couldn't say. I don't know just how far it was. I don't remember the distance I never thought nothing about the distance, really.

Q. But it was not on the tracks?

A. On the railroad track?

Q. Yes.

A. No. I don't know if it was on the track, but it was not between the rails, or not on the roadbed.

Q. Well, there was not, as a matter of fact, any culvert that led from the embankment down to the rails, that you walked down? A. Culvert?

Q. Well, a trestle then, or a bridge.

A. Down to the rails?

Q. Yes.

A. No, sir, none to the rails.

Q. How did you get down? Did you get down the embankment?

COURT.—He said he went up on his examination in chief, instead of going down.

A. We never came down no bank to the railroad at all.

Q. You went up, and the track was up high?

COURT.—He said the track was above where he entered.

Q. Was the track above where you entered?

(Testimony of Thomas Evans.)

A. Yes, we never jumped down no bank to get on the track.

Q. You went up, and when you got up on the bank, you found the track?

A. It was up on the bench.

Q. Just as this is in Defendant's Exhibit 2? You walked up, and there is the track where those cars are. Is that the way it looked?

A. I don't see the track there.

Q. Well, you see the cars on the track, don't you? Do you see that coach there?

A. I don't quite understand it.

Q. Don't that look like a coach, or does it, standing on the tracks?

A. Yes, I suppose that is it.

Q. Is that about the shape the tracks were, with reference to the ground, when you went up to it?

A. No, sir. The way this looks here, about half the coach is down over the bank.

Q. Well, that is on account of the distance, the picture being taken down here.

A. Yes.

Q. But the track was on a level at about where you entered upon it, as you came up the hill.

A. Yes, sir, it was on the level there.

Q. This cross that you put on here, do I understand that is where you entered upon the right of way and tracks?

(Testimony of Thomas Evans.)

A. As near as I can tell, that is as near. I never run through that cut there, I do not believe.

Q. Well, that does not show that you ran through any cut, does it? There is no cut beyond there towards Wilsonia?

A. No, but we didn't get on towards Wilsonia. We was back this way.

Q. What does this cross represent now? What do you aim that to represent?

A. That is as near as I can tell where we got on the track.

Q. Well now, that is going towards Wilsonia? That is looking that way, north? A. Yes, sir.

Q. Well now, from that point where you got on the track, how far was it down to where you were struck?

A. That I could not say. I don't know how far I did run, but it was not very far.

Q. I understood you to say yesterday about 200 feet you ran?

A. No, sir, I didn't say we ran 200 feet.

Q. Well, could you tell the jury about how far you did run?

A. No, sir. I didn't say we run. I said we went down the track.

Q. About how far was it?

A. I don't believe it was very far. The distance

(Testimony of Thomas Evans.)

I could not swear to. I will not say any distance, because I cannot swear to it.

Q. You would not say whether it was one foot or ten feet? A. It was further than that.

Q. You would not say it was 50 feet?

Mr. LATOURETTE.—Your Honor, I don't believe the jury can hear that conversation. I know we cannot back here.

Q. Would you say it was as far as 50 feet that you ran?

A. Yes, I believe it was further than 50 feet, but over that I would not say.

COURT.—Hasn't he been over that?

Mr. FENTON.—I am trying to tie his testimony to this cross he made on the picture.

A. As near as I can tell.

Mr. FENTON.—I am trying to tie the cross to the place of the injury.

Q. You would say it was as much as 50 feet?

A. I believe we went a little further than that.

(Witness excused.)

Mr. LATOURETTE.—We rest, your Honor.

Motion for Non-suit.

Mr. FENTON.—If the court please, I desire at this time to make a formal motion for a judgment of non-suit, upon the ground that the plaintiff has not proven a cause sufficient to be submitted to the jury, and upon the further ground that the proof shows,

beyond any sort of question, that the plaintiff himself was not in the exercise of ordinary care at the time of the accident; and upon the further ground that the proof fails to show that the defendant owed the plaintiff any duty other than not to wilfully or wantonly injure him after they discovered his presence and peril upon the track.

I do not desire at this time to argue the question, your Honor.

COURT.—The motion will be denied, then.

Mr. FENTON.—The Court will allow an exception in the record.

COURT.—Very well.

Mr. FENTON.—I want to say to your Honor, in order that the court may not misapprehend me, I shall press this same question at the close of the defendant's testimony, and I desire to have the matter considered open, so far as the law is involved.

COURT.—Yes, I understand.

Adjourned until Monday morning at 10 o'clock.

Whereupon the defendant, to sustain the issues on its part, introduced the following testimony:

Defendant's Evidence.

Portland, Oregon, December 19, 1910. 10 A. M.

J. R. McRAE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

Mr. McRae, what is your first name? A. J. R.

(Testimony of J. R. McRae.)

Q. What is your position?

A. I am employed by the Southern Pacific Company as chief clerk of the Claim Department.

Q. Are you also a photographer—take photographs? A. Yes, sir.

Q. I show you defendant's exhibit 1, and ask if you took that photograph, and if so, when?

A. Yes, sir, I took this photograph two days following the accident to Mr. Evans. I don't remember the date. It was two days following, anyway.

Q. Yes, the accident occurred on September 25th last—1909, I believe it was—a year ago last September. Where was your camera when you took that photograph?

A. Why, my camera was standing on the road-bed, between the rails, 300 feet from these men that appear in the picture—300 feet from them.

Q. That is 300 feet south?

A. Yes, sir, looking north.

Q. Now, those men that are standing in the picture, where are they supposed to be placed with reference to the place where the man was hurt?

A. They are supposed to be standing exactly at the point of the accident, where the man was struck. One of the men in that picture is Mr. Worthington. He is present here now. Mr. Coe Worthington.

Q. The gentleman who was on the witness-stand Saturday? A. No.

(Testimony of J. R. McRae.)

Q. No? Another one? Coe Worthington, you said?

A. Yes, sir, Worthington.

Q. Who is the man with the white—in his shirt sleeves there?

A. Mr. Smith, of the Claim Department.

Q. Then, Worthington is the man that is standing in the distance, down on the track?

A. Well, they were standing opposite, one on each rail.

Q. Oh, they are opposite each other? A. Yes.

Q. Now, I call your attention to a cross there is on that picture, indicated on the rail there, pencil cross, that was put there by Mr. Evans. Can you tell, from looking at that picture and the location of that pencil cross on it, about how far away that is from the man who is standing on the rail at the point where you say the man was hurt? That is, approximately?

A. It is kind of hard to say, but I would say it would be—it must be 50 or 75 feet, if it was measured on the ground.

Q. A little louder?

A. Possibly 50 or 75 feet, that cross would be, from where the man is standing.

Q. These two men that are standing, are standing on the rail opposite each other, are they?

A. Yes, sir.

Q. And the man that is dressed in dark clothes,

(Testimony of J. R. McRae.)

on which side of the track is he? I mean, which rail, the east rail or west rail?

A. Why, he is on the east rail.

Q. And the man that is in his shirt sleeves is on the west rail, as I understand you? A. Yes, sir.

Q. And your camera, then, was looking north, in the direction of Portland? A. Yes, sir.

Q. I will ask you, now, to state to the jury, if you know, about where your camera was with reference to the path that the plaintiff and his companion approached that track on from the east at the time of the accident.

A. Well, my camera was a short distance south of the path that the man is supposed to have come on the right of way.

Q. How many feet south of where it entered upon the right of way?

A. Well, I don't know hardly. I don't know how far apart those paths are exactly.

Q. Wasn't your camera north of that path?

A. Let's see—

Q. Towards Portland from where the path entered upon the right of way? You can look at the picture and see. Now, look at the picture and state, if you recollect, where your camera was with reference to the path upon which these men approached the track.

(Testimony of J. R. McRae.)

A. Well, the path was further back from the point of the accident than where my camera was.

Q. Then, it was further south?

A. It was further south, yes.

Q. Do you have any recollection of the approximate distance?

A. Well, not exactly. I should say possibly 75 to 100 feet; possibly more.

Q. I show you Defendant's Exhibit 2, and ask if you took that photograph, and when?

A. Yes, sir, I took this photograph, on last Friday.

Q. What does that represent?

A. Why, it is a photograph of a foot bridge that Mr. Evans, in his testimony, claimed to have crossed when he came up on the right of way.

Q. Which way is that looking, that picture?

A. It is looking west.

Q. And is it looking towards the track?

A. Yes, sir.

Q. Up the hill?

A. It is looking up the hill towards the track.

Q. Tell about how far that foot bridge is from the track, roughly speaking.

A. Why, it is somewhere between 150 and 175 feet. That is near it. I don't know exactly.

Q. Is that foot bridge, then, on the path that you understood Mr. Evans took that night?

(Testimony of J. R. McRae.)

A. Yes, sir.

Q. I show you a photograph, which may be called Defendant's Exhibit 3, and will ask you if you took that photograph, and if so, when, and what it represents?

A. Yes, sir, I took this photograph. It is another photograph of this same foot bridge, looking in the opposite direction.

Q. Which way was your camera facing at the time that was taken?

A. My camera was facing towards the river, or east.

Q. Then, in Defendant's Exhibit No. 2, which the jury has, which way was your camera facing?

A. It was facing away from the river, or west.

Q. I call your attention to a little house that is shown there in that photograph—what is that house?

A. Why, that is what is called the pump-house.

Q. Where is that pump-house with reference to the path that Mr. Evans and his companion came by?

A. It is right across this spur track, down on low ground there, and right near the path.

Q. What spur track do you allude to?

A. The spur track leading to the foundry.

Q. I notice these tracks in that picture. What tracks are they?

A. The spur leading to the foundry.

(Testimony of J. R. McRae.)

Q. Then, in coming from where these men did that night, did they cross this spur track?

A. They must have crossed it, yes.

Q. Then, in this picture, that little building is towards the river from the tracks of the company where he was run over?

A. Yes, sir.

Q. And the spur track is the spur track of the Oswego Iron Company?

A. Yes, sir.

Mr. FENTON.—Defendant offers that in evidence. Marked “Defendant’s Ex. 3.”

Q. I show you a picture which may be identified as Defendant’s Exhibit 4, and will ask you if you took that photograph, and if so, when, and what it represents?

A. Yes, I took this photograph last Friday. It is a photograph looking north towards Wilsonia, from the center of the Iron spur track—the spur leading to the Iron Works.

Q. How far was your camera, would you say, placed from Wilsonia, in the direction of Wilsonia, going down that spur track?

A. Well, I didn’t measure the distance.

Q. Was your camera looking towards Wilsonia down that track?

A. Yes, sir.

Q. What do you call that?

A. Why, it is a camera case.

(Testimony of J. R. McRae.)

Q. I notice there a camera case sitting between the rails. Is that a three-rail track?

A. Yes, sir.

Q. Now, where is the company's track?

A. The company's track would be to the right in this picture, above, on the high ground.

Q. Right or left?

A. Left, I should say.

Q. West? A. West, yes, sir.

Q. About how far would you say, roughly, that spur-track of the Oswego Iron Works is from the track upon which plaintiff was injured, at that point?

A. Oh, it is possibly 200 feet, or more.

Q. Up a hill? A. Yes, sir.

Q. Can you see Wilsonia in the distance, or is it visible? That is, the station?

A. Why, it would be visible. This photograph was taken on a rather hazy day, though. It doesn't show up to that distance.

Q. About how far down from this camera case to the station, would you say it was, roughly speaking?

A. Well, I should say it would be somewhere between 600 and 800 feet; just in a general way. I didn't measure it.

Mr. FENTON.—I offer this in evidence. Marked "Defendant's Ex. 4."

Q. Now, while the jurors are looking at Defend-

(Testimony of J. R. McRae.)

ant's Exhibit 4, I will ask you what this camera case is situated on? What is it laid on?

A. It is standing on the track, at a point where that path leading to the foot-bridge crosses the track.

Q. What path do you refer to?

A. The path that Mr. Evans claimed to have traveled on the night of the accident.

Q. That path going west across this spur?

A. Yes, sir.

Q. And you think about 200 feet west of that, or something like that, would be the point where he would enter upon the tracks of the Southern Pacific Company, where he was hurt? A. Yes, sir.

Q. I show you Defendant's Exhibit 5, and ask you if you took that photograph, and when, and what does it purport to represent?

A. I took this photograph last Saturday, and it shows, in a general way, the yards at Oswego, and it is taken from a point, possibly, oh, 150 or 200 feet from Wilsonia, looking towards Oswego.

Q. That is to say, where was your camera? Between the rails?

A. My camera was on the roadbed, between the rails.

Q. At a point about 150 feet south of Wilsonia?

A. Yes, sir.

Q. And looking which direction?

A. Looking south towards Oswego.

(Testimony of J. R. McRae.)

Q. Then Oswego would be in the distance?

A. Oswego would be in the distance, yes, sir.

Q. Is Oswego station building shown there?

A. Yes, sir, that is it.

Q. Will you mark a cross over the Oswego station building?

(Witness does so.)

Q. I notice a car or something up there in the distance—what is that? A car, or is it a blur in the picture?

A. It is a pile of steel of some sort.

Q. Alongside of the track?

A. Alongside of the track, yes, sir.

Q. Oh, it is not a car, then? A. No, sir.

Q. I notice over here a spur-track, or something of the kind, with a box car on it. What is that?

A. That is a spur track leading to the foundry.

Q. The Oswego Iron Company? A. Yes, sir.

Q. That is the one that goes on up towards Wil-sonia? A. Yes, sir.

Mr. FENTON.—Defendant offers this in evidence. Marked “Defendant’s Ex. 5.”

Q. Now, I will ask you what the fact is, if you know, as to whether there has been any change on the east side of that track since you took the first photograph, two days after the accident?

A. No, there has been no change to speak of.

Q. Where has the change been made?

(Testimony of J. R. McRae.)

A. It has been on the west side.

Q. What change was made on the west side?

A. Well, there has been some earth removed there; sort of an embankment cut down.

Mr. LATOURETTE.—What track is that, Mr. Fenton?

Mr. FENTON.—This is the main track we are talking about; and what I want to show to the jury is that on the east side of that track there has been no change, but that the changes have been made on the west side. Now, I call your attention to Defendant's Exhibit 1, and Defendant's Exhibit 5, and I wish you would show the jury what dirt has been removed, and what changes have been made.

Mr. LATOURETTE.—Well, now, just a moment. Your Honor, we do not wish to be technical, and are willing that those exhibits go in for what they are worth; but I think the facts are that there have been changes made, in both the bank and in the tracks; that is to say, the track of the Oregon Iron & Steel Company, since this accident occurred; and it looks to me as if those changes ought to be noted, or shown to the jury, if they are at all material or affect the case in any way. With that understanding, I am perfectly willing for the photographs to go in.

Mr. FENTON.—If the Court pleases, that is the very thing we are trying to show, that there have been no changes on the east side of the track, where this

(Testimony of J. R. McRae.)

man came up—the only changes were made on the west side—for the purpose of meeting his testimony on that subject.

COURT.—Very well.

Mr. HAYS.—We cannot concede that position, because the track has been shifted, as a matter of fact, further west, Mr. Fenton.

Mr. FENTON.—Well, we will put the testimony in on that subject.

A. This one is looking toward Portland, and this one is looking away from Portland, toward Oswego. In Exhibit No. 1, on the left of the picture, you will notice an embankment, and in Exhibit No. 5 you will notice that same embankment should appear on the right of the picture, but you will notice it is not there. It has been removed since. And you can see clear across to the track on the other side.

JUROR.—This is on the west of the track?

A. Yes, sir, this is on the west of the track.

JUROR.—Has that track been taken out?

A. No, that track is still there. It doesn't appear in this picture, because you cannot see it for the embankment. It is right on the other side of this embankment.

Q. I show you Defendant's Exhibit 6, and ask if you took that photograph, and when, and what it represents?

A. Yes, sir, I took this photograph.

(Testimony of J. R. McRae.)

Q. When was that taken?

A. Last Saturday.

Q. And what does it purport to represent?

A. Why, it represents the yards at Oswego.

Q. Now, I wish you would take that photograph, Defendant's Exhibit 6, and Defendant's Exhibit 1, and point out the changes that have been made, and where they are.

A. Defendant's Exhibit 6 is taken much nearer Oswego depot than Exhibit 1, and it shows much more of the track. Exhibit 1 was taken at a point, well, about where this cross is, and it would be looking from that point on towards Portland, and in the right of Exhibit 1 you will notice an embankment, and you will see the space in Exhibit 6, just to the left of this cross, where this embankment has been removed; and also a little further up there is quite an embankment been removed.

Q. Then, this embankment you speak of, which side of the track was it—east or west side of the track?

A. It was on the west side.

Q. Has there been any change, then, materially, in the location, in the track and the approach to the track from the east side?

A. No, sir.

(Examination by Mr. DEY.)

Q. Where would this portion along here by this telegraph pole appear in this picture?

(Testimony of J. R. McRae.)

A. Why, it would appear just immediately the other side of this cross. Well, immediately farther away than the cross.

(Examination by Mr. FENTON.)

Q. Both of those photographs, Defendant's Exhibits 1 and 6, are taken looking towards Portland, are they?

A. Yes, sir. Exhibit 6 is taken much farther away—much closer to Oswego than Exhibit 1. Exhibit 1 is 300 feet from the point of the accident, and Exhibit 6 is possibly, oh, possibly 600 or 700 feet.

Q. That is, your camera was that distance away?

A. Yes, sir.

Q. I show you Defendant's Exhibit 7, and will ask if you took that photograph, and if so, when, and what it represents, and show the jury.

A. I took this photograph last Saturday.

Q. Just show it to the jury.

A. It represents, in a general way, the principal conditions of where this man is supposed to have entered upon the right of way.

Q. Does that show the bridge or walk that he is said to have come up the hill towards the track?

A. Yes, sir.

Q. Which way was your camera facing when that was taken?

A. Well, my camera was facing east and north.

Q. Now, in looking at that picture, I notice a man

(Testimony of J. R. McRae.)

standing there, and then I notice another man standing in the distance, down towards a track, which I suppose is the track of the Oswego Iron Works. Is that right? A. Yes, sir.

Q. Now, where is this man standing with reference to the culvert or walk that Mr. Evans is supposed to have passed over when going up to the tracks of the company?

A. Why, he is standing on that foot bridge.

Q. Now, I notice a track on the top of the hill there, and will ask you what track that is, with reference to where the plaintiff entered upon the track of the company?

A. Why, that is what was at that time the main track. It is the most eastern track in the yard.

Q. Track towards the river? A. Yes, sir.

Q. Now, will you indicate where Evans must have entered upon that track by marking a cross?

Mr. LATOURETTE.—Now, your Honor, I think we will have to object to that question. This witness is an expert artist, and does not claim to have any personal knowledge of where the plaintiff entered upon that track.

Mr. FENTON.—Well, I will put it this way—where the path entered upon the track.

Mr. LATOURETTE.—It is a question that assumes knowledge on the part of the witness, and he does not profess to know a thing about it. He was not in that part of the country.

(Testimony of J. R. McRae.)

COURT.—Well, the question is changed now, and the inquiry is where the path entered upon the track.

Q. Now, where is the cross? A. There.

Q. Mark it.

A. You will notice the man standing in the distance furthest away is on the foot-bridge, and the second man here is standing in the path, and also this man closest is standing in the path, and the path runs right up onto the track. It runs sort of zig-zag up the hill. It doesn't run exactly straight. It curves a little bit there.

JUROR.—What is this?

A. This is not a bridge here at all. That is some planks. You will notice the bridge is right alongside of the track, and the path comes up here.

Q. Mark the rail where that path, if it went onto the track, would have crossed over the rail.

A. That would be just about the place, where the cross is.

Q. Now, I call your attention to Defendant's Exhibit 3, and will ask you to show the jury the same thing in both photographs.

A. Exhibit 3, it is taken much closer to the bridge, and it shows up the foot-bridge and the track and also the iron spur in the background much plainer. You will see it in the right of exhibit 7. You can see the man standing in the middle of the bridge.

(Testimony of J. R. McRae.)

Q. This same spur that is seen in Exhibit 7 is shown plainer in Exhibit 3?

A. Yes, sir, bringing it much closer.

Q. And is it the same iron pipe that is shown in both?

A. Yes, sir.

Mr. FENTON.—I offer that—Defendant's Exhibit 7.

Q. You were out over this track Saturday and Friday, as I understand?

A. Yes, sir.

Q. And you were there two days after the accident?

A. Yes, sir. I was there the next day after the accident, and also the day following.

Q. Now, I will ask you to state to the jury what the fact is as to there being any path leading from where this path enters upon the tracks of the company, leading towards Wilsonia?

A. Well, not very much of a path there. The roadbed was quite rough—rocks and so on.

Q. I wish you would just describe in a general way what the appearance of this path is as it led up the hill through the brush there, over this walk.

Mr. HAYES—Which path do you allude to, Mr. Fenton—the one Evans traveled over?

Mr. FENTON.—The one Mr. Evans traveled over.

A. Well, it is a fairly good path. The ground is beaten down some. There is no grass growing on it.

Q. Now, I will ask you to state to the jury what

(Testimony of J. R. McRae.)

the fact is in this respect—is there or is there not any path between where this particular path leads up on-to the track and the place where Evans was hurt?

A. No, there is no path.

Cross Examination.

(Questions by Mr. LATOURETTE.)

You say you took those photographs last Friday?

A. Part of them last Friday, and part of them Saturday. I stated in each case, I think, which was taken each day.

Q. How long have you been working for the company? A. A little over two years.

Q. Which two of those photographs did you take two days after the accident?

A. I just took one of them. That is Exhibit 1.

Q. Exhibit 1. That is looking down the track there from up about that cut, isnt it?

A. Yes, sir.

Q. Well, what is the reason you didn't take the rest of them there before those changes had been made in the bank and the tracks out there? You were not told to, were you? A. No, sir.

Q. Well, who told you to go up last Friday and take those others?

A. One of the men in the Claim Department.

Q. Claim Department?

A. Yes, sir. One of my superiors in the Claim Department.

(Testimony of J. R. McRae.)

Q. They told you what to do, and you went and did it? A. Yes, sir.

Q. That is all you know about it? You don't know what changes have been made, do you, in the track, or the bank up there, since this accident?

A. Why, yes, I do, in a general way.

Q. Well, are you familiar with that locality up there, Mr. McRae?

A. Yes, sir, somewhat, in a general way.

Q. That is to say, you have been up there before?

A. Yes, sir.

Q. How many times?

A. Oh, possibly five or six times—something like that.

Q. But you only went up there once to ascertain the facts, or any facts connected with this case, prior to Friday?

A. No, I went up there two or three times.

Q. Before last Friday? A. Yes, sir.

Q. But you only took one photograph?

A. That was all.

Q. What other business had you connected with this case up there on those trips?

A. Well, I was inquiring as to the facts and circumstances surrounding the accident.

Q. Oh, yes. They had you as a sort of special man to go and look up the facts of the case, did they?

A. Why, it might be called that, yes.

(Testimony of J. R. McRae.)

Q. And you inquired of people up there?

A. Yes, sir.

Q. About Evans? A. Yes, sir.

Q. And about the accident? A. Yes, sir.

Q. So that you have been doing other work besides artist work here in this case, have you?

A. Yes, sir, I have; that is, some.

Q. And you only took one photograph right after the accident? A. That was all.

Q. And then on the first day of this trial you went up there and took the rest of these?

A. Yes, sir.

Q. And did you use your own judgment in taking these views, or did you follow the directions of the counsel or some employee?

A. Why, I used partly my own judgment, and partly under the direction of one of my superiors in the Claim Department.

Q. You work in the Claim Department, do you?

A. Yes, sir.

Q. Oh, you are not in the engineer's department?

A. No, sir.

Q. So that you are a part of the Claim Department of this company? A. I am.

Q. Are you by profession a photographer?

A. No, sir.

Q. You don't claim, then, to be especially—

(Testimony of J. R. McRae.)

A. No, sir, I have never been in photography professionally.

Q. Well, the Engineering Department of that company has an art annex, doesn't it?

A. Why, I don't know as you would call it that. It is very much similar to the work I do.

Q. You are a sort of an amateur photographer, then?

A. Why, I might be considered that, I suppose.

Q. And you do other detective work for the company?

A. Why, not exactly detective work.

Q. Well, at least information work?

A. Yes, sir.

Q. Now, you went up there and found this path, as you were informed, that the plaintiff went over when he went up to the track, did you not?

A. Yes, sir.

Q. Then you went down to a point where you were informed he was injured? A. Yes, sir.

Q. And you examined pretty carefully the territory and the ground between those two points, did you not? A. Yes, sir.

Q. Now, did you examine the condition of the ground and the right of way beyond that, up to Oswego—south?

A. Why, I didn't make any special observation of the ground. I just walked over it is about all.

(Testimony of J. R. McRae.)

Q. Over the right of way? A. Yes, sir.

Q. Did you make any special examination of the ground between where this young man was hurt and Wilsonia?

A. Why, not any special examination of the ground in particular, no, sir. I walked over it.

Q. Well, did you make as much examination of it as you did of the territory between this path and Oswego?

A. Why, I suppose I did. I walked over all the ground—walked over the whole business.

Q. What did you examine for between where this young man was hurt and Wilsonia station? What did you look for—anything?

A. I wasn't looking for anything in particular, no, sir.

Q. Did you look for anything in particular between where he came up onto the track and Oswego?

A. No, sir.

Q. Were you told to look for anything when you went up there?

A. No, sir, I wasn't given any instructions whatever.

Q. Now, you come here and you swear there was no path between where this young man was hurt and Wilsonia, do you? A. Yes, sir.

Q. And you didn't examine it?

(Testimony of J. R. McRae.)

A. You mean when? At the time of the accident or at the present time?

Q. Well, you wasn't there at the time of the accident, were you?

A. I was there the next day after it.

Q. Well, at that time was there any path?

A. Well, I don't know whether there was or not. I didn't search for any.

Q. Well, you testified a little while ago that there was not, didn't you?

A. I said at the present time, is what I meant to say. I thought you was questioning me as to the present time.

Q. Well, we don't care so much about that. At that time you didn't examine?

A. I didn't examine for a path at that time.

Mr. FENTON.—It wasn't between Wilsonia and the place of the accident, but between the place of the accident and the path where he entered upon the right of way? A. Yes, sir.

Q. So you didn't examine between the place of the accident and Wilsonia to see whether there was any path leading up and down or across that at all?

A. Between where?

Q. Between where the accident happened and the station of Wilsonia?

A. Why, I didnt examine it with the idea of finding any paths, no.

(Testimony of Harry A. Hampton.)

Redirect Examination.

Q. Mr. McRae, my associate in the trial of this case, who is here, went with you on last Saturday, didn't he? A. Yes, sir.

Q. In the afternoon? A. Yes, sir.

Q. And assisted in pointing out to you what he desired to have taken?

A. Why, he pointed out to one of the men in the Claim Department what he was to have taken, I suppose, and he pointed out to me what he wanted to have done.

Q. That was Mr. Fred Day, in the Claim Department?

A. Yes, sir. I worked under his instructions.

Q. You went out there, then, under instructions from the Law Department?

A. Well, yes, indirectly.

(Excused.)

HARRY A. HAMPTON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

What is your business, Mr. Hampton?

A. I am engineer in the Maintenance Department of the S. P. Company.

Q. How long have you been an employee in the

(Testimony of Harry A. Hampton.)

Engineer's Department of the Southern Pacific Company?

A. I have been with them a year and six months, I believe.

Q. Did you make a survey and an examination on the ground of the location of the tracks and physical situation at Oswego and Wilsonia, and did you then make a map or plat showing the result of your investigation and measurements and survey?

A. I did, yes, sir.

Q. When did you do that?

A. Part of the work was done early in the spring of this year, and part of it was done Saturday last week.

Q. I show you a paper which, for the purpose of identification, may be marked "Defendant's Exhibit 8," and will ask you if you made the tracing from which this blue print was made, and whether or not it correctly represents the situation of the tracks, the physical surroundings of the property at Oswego and Wilsonia as the same now is.

A. No, it does not represent the tracks as they are now. It represents the tracks as they were supposed to be prior to September.

Q. At the time of the accident to Mr. Evans?

A. Yes.

Q. September, 1909? A. Yes.

Q. Now, what scale is this exhibit 8 on?

(Testimony of Harry A. Hampton.)

A. Drawn on a scale of one inch equal to 50 feet; that is, one inch on the map would be equal to 50 feet on the ground.

Q. Is it correct as to the distances as they were at that time? A. It is.

Q. In which direction is Portland on this blueprint? A. Portland is to my right.

Q. This way? A. Yes.

Q. I notice on here a platform "Wilsonia." Is that a correct location of the platform at what they call Wilsonia? A. It is.

Q. Now, which way is north on this map?

A. North, the true north direction would be represented by the arrow.

Q. Which way would be towards Portland—this way? A. Yes.

Q. And which way toward Oswego?

A. This way.

Q. Where is Oswego station and platform?

A. It is shown as indicated on the map.

Q. Marked here? A. Yes.

Q. Now, what is the distance, and what was the distance at the time of this accident, between the depot at Oswego and the station platform at Wilsonia?

A. As I remember it, it is a little over 1400 feet around the old track. I can tell it exactly.

Mr. HAYES.—When you say the old track, you mean the one upon which he was hurt?

(Testimony of Harry A. Hampton.)

A. This old main track is indicated by the solid line.

Q. Now, just tell the jury what was the track that was in use at the time Mr. Evans was hurt.

A. The track in use at the time he was hurt is the track shown in the solid white lines, with the numbers, shown on the front.

Q. Then, I will trace it by my pencil, so we will get it right. This where I am pointing is the platform at Oswego, is it?

A. At Wilsonia.

Q. At Wilsonia. And in the direction that my pencil points is towards Portland?

A. Yes.

Q. And the track that led from Oswego to Wilsonia, and which was in use at the time Mr. Evans was hurt, is traced by my pencil now between the white lines that are solid? Am I correct?

A. Yes, that is correct.

Q. Now, what are these hatched lines? What do they indicate?

A. Did you say the track that was used now, or when he was hurt?

Q. No, when he was hurt.

A. The solid one is the track that was used when he was hurt.

Q. What is this?

A. The dotted line is the track used now.

Q. Which way is towards the river on this map, down hill?

(Testimony of Harry A. Hampton.)

A. The river is towards the top of the map here.

Q. Now, I notice on here some paths and a bridge. What is this that I am pointing at—a path?

A. Yes. That is a small path and a bridge leading from the tracks and yards now, down across the old Oregon Iron and Steel Company's tracks.

Q. What does this track I am marking here indicate?

A. That is Oregon Iron & Steel Company's spur.

Q. Now, where is the foundry with reference to this property?

A. The foundry is in the same direction as the river—towards the top of the map, almost at right angles to the track.

Q. Then, as I understand the testimony in this case, Evans was down here at this foundry or barn, and started up the hill, and he passed over this bridge here that is shown in the photograph, went up this path, and struck the track that was then in operation at the point where my pencil is now indicated. Is that correct?

A. That was the way it was explained to me.

Q. Well, now, is there a path on the ground there at this time, and was there?

A. Yes, there is a path. There has been a path there from my first recollection.

Q. Is there a path there now as shown?

A. There is a path there now.

(Testimony of Harry A. Hampton.)

Q. Now, I notice over here in the hatched line what is marked as a county road? A. Yes, sir.

Q. Where is that with reference to the right of way of the company? West of the right of way or east of it?

A. It is west of the right of way.

Q. I notice blocks marked over here. What is that—platted part of town?

A. Platted part of the town of Oswego.

Q. What does this line indicate?

A. That line indicates the right of way line of the railroad company, and also the line of the county road—the east line of the county road. The hatched line represents the traveled track of the county road.

Q. I notice a figure here “70” indicating that the width of that county road at that point is 70 feet? Is that the correct measurement?

A. Yes, that is,—It is the record width of the street—recorded.

Q. Is this place here that indicates a street, is that open? A. That is an open street.

Q. Is it improved or not? At that time was it improved, or is it now improved?

A. Well, the streets in Oswego are not generally improved.

Q. What I am getting at is this, Mr. Hampton. I notice this path comes up onto the track here. Now, in this blue print it stops at the middle of these rails

(Testimony of Harry A. Hampton.)

in this main track. Did you notice whether that path extended across and connected with that street, or was there anything to show?

A. There are paths. So far as the earth remains now, there are paths down there at most all of these places, there are paths leading up to the county road.

Q. Across?

A. Of course, considerable of that dirt has been removed, and this map represents the paths as they now are. But back here there are trails leading across—scattered trails leading across from the west to the county road.

Q. Now, I want to ask you this question: If all of those trails that are there do not cross the right of way from the lower side, east side of the right of way, to the west side of the right of way?

A. There are paths opposite each one of them, yes, except perhaps this one. (Pointing to the one furthest towards Oswego). So much of the dirt has been removed there that there are no indications as to whether there was a path at the time or not.

Q. Now, you say that the dirt has been removed on the west side of this track, or of these tracks?

A. Yes.

Q. Where? Just point to the jury where the dirt has been removed.

A. Well, on the west side of the old track as it was, the dirt has been removed to perhaps fifteen or

(Testimony of Harry A. Hampton.)

twenty feet, well, out of the top of the cut. It has been removed fully twenty feet from the dotted track.

Q. From this hatched line here?

A. From the dotted lines.

Q. Now, what is the fact as to there being any changes toward east of this track upon which Evans was struck?

A. There has been no changes where the paths are shown. The paths as shown there are as they always were.

Q. What I am getting at is, some of those photographs show an embankment along this track on the west side. Do I understand that embankment has been more or less removed?

A. Yes, that embankment has been removed.

Q. Has there been any change on the river side of that track?

A. Well, no, not since—no, there have been no changes since the accident is purported to have taken place.

Q. I show you Defendant's Exhibit 1, which purports to represent the track at a point near where Evans was hurt, and looking towards Wilsonia, which shows an embankment on that side, the left side looking north, and shows some brush and shrubbery and stuff on the east side, on the river side. Can you show the jury where that picture would be on the track here, the physical situation, or do you know?

(Testimony of Harry A. Hampton.)

A. Yes. There is a cut in along around the outside of this curve.

Q. Which side? There is a cut there?

A. Yes. There is a cut up from the track.

Q. I wish you would mark on this blue print where that cut is with reference to this path that goes onto the track.

A. Well, beginning at a point about here—

Q. When you say “here,” you better mark it.

A. Yes, I am running my pencil down. The cut runs along that way fully around that curve as it was then. That cut is represented in the picture here.

Q. Now, does that remain the same at the present time?

A. Yes, that cut is the same now as it was then.

Q. Now, about how far north of that path where it enters upon the track does that cut begin, would you say, in feet?

A. Oh, about twenty feet, perhaps.

Mr. HAYES.—Which path do you allude to, Mr. Fenton?

Mr. FENTON.—This path upon which Evans went up the track.

Q. I notice down here Oregon Iron and Steel Company’s spur. Do I understand that spur, at the time of the accident, put in at Wilsonia?

A. Yes.

Q. Just as it is shown in this blue print?

(Testimony of Harry A. Hampton.)

A. Yes. I believe there have been no changes at all in that track, except heavier steel put in.

Mr. FENTON.—I offer this blue print. That is a correct representation of the situation? A. Yes.

Mr. FENTON.—I offer the blue print, Defendant's Ex. 8, in evidence.

JUROR.—Where is that?

A. That runs up to the point.

Q. (Cross) Where he was hurt?

A. Yes, the cross.

Q. What does this indicate?

A. That is a trail leading down over the hill.

Q. (Cross) Where is the point he was hurt?

A. The cross.

Q. (Cross) Where is the trail?

A. This is the trail. It is a slightly worn trail down.

Q. This is the trail that was pointed out to you as the one he came up on?

A. I don't know as to that trail, whether that trail was there at the time or not. It is on the ground now.

Q. Was there any foot-bridge on this trail?

A. No, there was no foot-bridge.

Q. Which way does that trail run?

A. Why, it crosses out over the Oregon Iron and Steel Company's spur, and runs down into the hole here.

(Testimony of Harry A. Hampton.)

Q. Does that trail lead to the barn and the foundry?

A. No, I should say it did not, only in a round-about way.

Q. Then, as I understand, there is no foot-bridge of any kind on this trail I am pointing at, that apparently comes out at the point where this man was hurt? A. No.

Q. Is there any foot-bridge anywhere except this one that is pointed at on the trail, that is indicated here at this point, and shown in the photograph, Defendant's Exhibit—

Mr. HAYS.—We don't contend that there is, Mr. Fenton.

Mr. FENTON.—Do you admit that he came up this path?

Mr. HAYS.—Yes, where the pipe and bridge is.

Mr. FENTON.—Yes.

Mr. HAYS.—Yes, we admit that, certainly.

Mr. FENTON.—No question about that, then?

Mr. HAYS.—No; of course he came up there.

Q. Is there a pipe alongside of this bridge?

A. Yes.

Q. Is there a pipe alongside of any other bridge?

A. No.

Q. I will show you Defendant's Exhibit 2, and ask you if that is the pipe and the bridge that is talked about, and the path?

(Testimony of Harry A. Hampton.)

A. Yes. That is the path and bridge represented on the map, the path shown in this photograph.

Mr. HAYS.—That is where he came up, as a matter of fact, Mr. Fenton.

Mr. FENTON.—Now, you admit, Judge Hays, that this is the pipe and this is the bridge, shown in Defendant's Ex. 2, that the plaintiff traveled?

Mr. HAYS.—I won't admit that that is the one. I will admit that he crossed a trail there, and that it is the trail described by the witnesses.

Mr. FENTON.—And that it had a pipe along it?

Mr. HAYS.—Yes, we admit that. I won't admit the correctness of that plat, however, with reference to measurements, and the place where he was hurt.

Q. How did you make these measurements, on the ground?

A. They were made on the ground.

Q. What did you make them with?

A. They were made with tape.

Q. Steel tape? A. Yes.

Q. How many feet is it from where this man entered on this path on that right of way to the point of the accident? A. 370 feet.

Q. Did you make the actual measurement?

A. Yes, I measured that.

Q. And that is correctly made, was it?

A. Yes.

Q. 370 feet, then, as I understand, from where

(Testimony of Harry A. Hampton.)

he must have entered on the track to the point where he was found?

A. Yes, as the point was pointed out to me.

Q. Is there any path between that point and the point where he was hurt entering upon the track?

A. No, sir.

Q. I mean, leading from up the hill?

A. No, sir, there are none.

Cross Examination.

(Questions by Mr. LATOURETTE.)

Mr. Hampton, how many trails did you find between Oswego and Wilsonia, leading from the East side?

A. I found the number represented on the map—I think four, that is, counting the one at—

Q. And they all led from down in the vicinity of the foundry, I presume?

A. Yes, down on the hill.

Q. Some would lead up to Oswego: The first one, I think, had a flight of steps leading up to the track, didn't it?

A. The first one north of the Oswego depot has steps.

Q. Do you know who built those steps?

A. What is that?

Q. Do you know whether those steps were built by the company, or by the foundry people, or who?

Q. No, I don't know whom those were built by.

(Testimony of Harry A. Hampton.)

Q. You saw the steps there?

A. They were there, yes.

Q. Now, the second one, down below that, enters about how many feet from Oswego?

A. I didn't measure that distance. I can tell approximately by scaling on the map.

Q. That is the one that has a bridge, which is photographed there?

A. Yes, sir, the second path.

Q. Now, on down beyond that, further towards Wilsonia, there is another one that is marked, up towards Oswego. Do you recollect that?

A. Yes, sir, that is another one.

Q. I will ask you where you were informed that this young man was hurt. Can you locate that point, between those two paths?

A. The point I was informed that he was hurt is the point represented by the little cross right at the last path you referred to.

Q. That is right near this other path, isn't it?

A. Yes.

Q. And taking Defendant's Exhibit 1, observe that little pencil cross down there on Defendant's Exhibit 1. Is that about the point where you understood that he was hurt?

A. I should say he was hurt 20 or 30 feet, yes, fully.

Q. Within 20 or 30 feet of it?

(Testimony of Harry A. Hampton.)

A. Yes. I suppose that point represents the point on the track there, and not a point up in the air, or anything of that sort. I should say it was fully 30 feet, anyway, north of that point on the picture.

Q. Where he was hurt? A. Yes, sir.

Q. Now, you think he was hurt about 20 or 30 feet north of where he says he was hurt, if he made that cross there?

A. Well, yes. Of course, that cross on the picture doesn't—

Q. Well, as near as you can tell, of course, approximately?

A. Yes, from the looks of the picture, that is what I would say.

Q. You are not measuring now with your instrument, but simply your best judgment?

A. Yes. I would say it was fully that far.

Q. Where is the other path toward Wilsonia? Did you mark that on this map?

A. There is a path just opposite the platform at Wilsonia, that is shown on the map—path leading to a slightly traveled road.

Q. And is there a flight of steps from that path up to the Wilsonia station?

A. No. No, there is no flight of steps.

Q. Well, how do they get up there?

A. It is just simply the hillside. There is nothing to climb up particularly.

(Testimony of Harry A. Hampton.)

Q. Now, if you will be so kind as to step down here. Now, mark out and point to the jury that path that runs up to Wilsonia. A. There.

Q. You have marked it on here? A. Yes.

Q. How does that run? Can you trace it there with your pencil?

A. It runs along in about here.

Q. That runs down to the Iron Works, does it?

A. As to anything off this map, I would not be certain, but it runs in a general direction out into this.

Q. Following that path, can you get up to the track here a convenient way?

A. No, there is not much cut across lots; there is no trail.

Q. Can you get up?

A. You could get up, yes.

Q. It is all open ground, isn't it? No large timber or anything of that kind?

A. No, there is brush; just brush and stumps.

Q. Is there a fence?

A. There is a fence parallel to this track, 50 feet out. There is a fence off in here.

Q. This path was inside of the fence, was it?

A. This path is outside the fence.

Q. Why do you mark the fence up there when it should be up here?

A. No, the fence is here. The road is outside.

(Testimony of Harry A. Hampton.)

Q. Is that fence between the path and the track?

A. It is between the path and the track.

Q. How far along does that fence run?

A. I believe the fence runs clear through. It is outside.

Q. How do you get across the fence here to get up to the station?

A. There is a break in the fence here. There is a break in the fence here. There is a gate. At this point there is a stile. It is on the property of the Oregon Iron and Steel Company.

Q. That is not built with reference to the right of way of the railroad company at all?

A. No, it is entirely off the right of way of the Southern Pacific.

Mr. FENTON.—It is built with reference to the spur track of the Oswego Iron Works?

A. Yes, sir.

Q. How about the level of this path down here with relation to the railroad track?

A. There is a hill right alongside of the railroad track here of perhaps two or three feet, and then the path slopes gently down the hill.

Q. How about the slope down here?

A. There is a steep slope from the track here down to this Oregon Iron and Steel Company's track.

Q. How steep?

(Testimony of Harry A. Hampton.)

A. It runs down to a sharp angle. Probably drop every 18 feet, I should say, three or four.

Q. It drops at an angle of 45 degrees, anyway?

A. Yes.

Q. How about this?

A. This is all uphill path.

Q. There is a cut in here?

A. There is a cut in here on this side of the track.

Q. And then that apparently slopes up here, too?

A. Yes, there are steps there, leading up onto the embankment.

Mr. FENTON.—This is the path you agreed he came up?

A. The path with the bridge on. It is the only path with a bridge.

Mr. FENTON.—Let the jury understand that.

Q. How much lower is the Oregon Iron & Steel Company's railroad track than the Southern Pacific track?

A. They are on different grades. The Southern Pacific track runs up. The Oregon Iron & Steel Company's track runs down on a sharp grade.

Q. How far between these two points here, where that path—path No. 3, we will say, No. 2, leaves the Iron Company's railroad track, up to the Southern Pacific track? What is the difference in elevation?

A. I didn't take any difference of elevation exactly, but I should say it is about 30 feet.

(Testimony of Harry A. Hampton.)

Q. It would be about 30 feet?

A. Yes.

Q. And the distance is how far?

A. Why, there is a distance of 150 feet from the bottom track to this—125 feet.

Redirect Examination.

Q. It scales 50 feet to the inch? A. Yes.

Q. Just measure that, won't you?

A. It is 146 feet.

Q. What does this line represent?

A. It represents the right of way of the Southern Pacific Co.

Q. Then, how far is this bridge from the right of way?

A. It is 25 feet; fully 25 feet.

Q. To the east?

A. Yes, east of the company's right of way.

Q. (Cross) Which end?

A. The nearest end to the right of way.

Q. I will ask you if a person had come up to this point on the Oregon Iron & Steel Company's spur, was there any reason to prevent them going down this track at that time to Wilsonia direct?

A. Much better walking that way than up on the hill.

Q. He could have gone that way if he had intended to take the train at Wilsonia? A. Yes.

(Testimony of J. E. McCutcheon.)

Recross Examination.

Q. Do you know whether there is any car standing there on that track or not?

A. At the time of the accident?

Q. Yes.

A. I don't know. No, I know nothing about it.

Q. You don't know anything about that?

A. No.

Q. And you don't know how it would have been after night at that time traveling up that track?

A. Well the conditions would have been the same on both tracks, unless there were cars on the track. I don't know whether there were cars on the track or not.

Redirect Examination.

Q. The distance from that point to that star, where the man was picked up, found after he was struck, is 370 feet, as I understand?

A. 370 feet.

Q. That is where he was struck as pointed out to you?

A. Yes, that was pointed out to me.

(Excused.)

J. E. McCUTCHEON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

(Testimony of J. E. McCutcheon.)

Mr. McCutcheon, what is your business?

A. I am section foreman for the S. P. Company.

Q. And where do you live?

A. At Oswego, or near Oswego.

Q. How long have you been section foreman for the company?

A. Since the first of April, 1902.

Q. And where was your home, did you say, during that time?

A. Well, since the first three weeks I was foreman I have been at Oswego.

Q. Living in the town of Oswego?

A. I live about three-quarters of a mile this side, at Briarwood station.

Q. Now, do you recollect, Mr. McCutcheon, when Wilsonia platform was installed a flag station?

A. Well, I couldn't give the exact date, no. I put in the platform there about—

Q. Well, Mr. Evans was hurt on the 25th of September, 1909, a year ago last 25th of September now. How long before that time do you say it was that this flag station was installed—about how long?

A. Well, about two or three years before that, I think, anyway. I think it is possibly four years.

Q. What is there at Wilsonia besides a flag station and the platform?

A. I didn't understand.

Q. What is there at Wilsonia besides a platform?

(Testimony of J. E. McCutcheon.)

A. Well, at that time there was nothing at all, except a sign there reading Wilsonia.

Q. And since the accident, there has been what?

A. There has been a little shed depot put up there for shelter for passengers.

Q. Now, I will ask you if there was any business at Wilsonia, or is there now any business?

(Witness shakes head).

Q. Well, I don't get that shake of the head in the record. You say no, do you?

A. Yes, sir. Business industry?

Q. Is there any store there, or any shop, or saloon—any place of business?

A. No, sir, nothing.

Q. Any station agent? A. No, sir.

Q. Any telegraph operator? A. No, sir.

Q. Now, how close, is the nearest family that lives, to that place, at the time of this accident?

A. Well, Mr. Wilson, I guess, would be about the closest, I judge—600 or 700 feet.

Q. Where did he live with reference to the station?

A. Well, he lived up the hill, well, a little north-west of the station.

Q. Now, were you there at the time of the accident, or next day, or shortly afterwards?

A. I was there the next morning, yes, sir.

Q. Now, I will ask you to state, if you can, wheth-

(Testimony of J. E. McCutcheon.)

er you could see any indications of an accident having occurred there?

A. Well, there was some blood on the grass there, was all the indications I could see.

Q. Who pointed out the place where he is said to have been found or picked up?

A. Who pointed out the place?

Q. Yes, to you. How did you know that was the place?

A. Well, I don't know that any one pointed out. I was told when I started to work in the morning, when I went out, I was told there was an accident there, and I went back and examined. I rather think I found the place myself. I don't think it was pointed out to me.

Q. Do you know where the foundry of the Oregon Iron & Steel Company was at that time?

A. Yes, sir.

Q. And the barn? A. Yes, sir.

Q. Where was that with reference to the place of the accident?

A. Well, it was east—direct.

Q. Down the hill? A. Yes, sir.

Q. Now, do you remember a path that led from that barn up the hill, across a bridge, along a big pipe?

A. Yes, sir.

Q. And do you remember about where that path entered upon the right of way of the company?

(Testimony of J. E. McCutcheon.)

A. Yes, sir.

Q. I show you Defendants Exhibit 2, and ask if that is a good picture of that walk and big pipe and railing as it was at that time?

A. Yes, sir, it is a good picture of it.

Q. Now, I show you Defendant's Exhibit 8, and call your attention to what seems to be a path indicated on this blue print, which shows a bridge, Oswego being up here at that place, and Wilsonia down here towards Portland, and this being the track upon which the train was running at the time Mr. Evans was hurt. Now, do you remember that?

A. Is this Oswego?

Q. This is Oswego up here, as I understand it, and this is Wilsonia down here, going towards Portland. About where is the path, if you recollect, having the bridge on it? Does this indicate it about there?

Mr. HAYS.—We will admit, Mr. Fenton, that that has the bridge on it.

A. Yes, sir.

Q. There is only one path that has a bridge on it leading up to the track? A. That is all.

Q. Now, the testimony here has located Mr. Evans at this star, at the place where he was hurt, north of where that path enters upon the right of way or tracks of the company. A. Yes, sir.

Q. A distance of 370 feet. I will ask you to state to the jury, if you recollect about how far, or whether

(Testimony of J. E. McCutcheon.)

that is about the correct distance that this blood was that you found there, or saw on the rail, north of the point where that path entered upon the track.

A. If that is the correct distance?

Q. About that?

A. It would be about that, yes.

Q. Now, at that time, do you recollect whether there was any cut on this curve?

A. That is, on the curve there?

Q. Yes.

A. Yes, sir, there is a cut.

Q. Has there been any change in that cut and track, and situation east of the track, towards the river?

Mr. HAYS.—We don't contend there has been.

A. There has been no change in the ground or track—we lined it in a little to straighten the curve between these points. Laying along here the old roadbed is exactly the same as it was up to the end of this cut, and from here we lined the track here to straighten it through for the side-track. The track is the same, except we possibly lined it in—possibly eight feet from the old roadbed.

Q. So that, with that exception, the physical situation is the same? A. Exactly the same.

Q. With the track and all east of it?

A. All east of it.

Q. These paths that entered upon this right of

(Testimony of J. E. McCutcheon.)

way and track at the time of this accident, Mr. McCutcheon, did they lead across the track up the hill, or where did they go?

A. They go across the track, all of them; some of them directly straight across, some of them agling across.

Q. Now, what is the fact, if you know, as to whether there was any track or path leading from this point here where he entered upon the right of way, towards Wilsonia on the track? Was there any path there at that time?

A. Leading from where he entered?

Q. Leading from that point where he entered down the track to Wilsonia? Was there any path there?

A. From here to Wilsonia?

Q. Yes.

A. Well, there was a path comes out on the track right at Wilsonia. This is the Oregon Iron and Steel Company's track?

Q. Yes. A. That comes out here like that.

Q. This is shown here, this path?

A. That was a road.

Q. Was there any track between the rails from that point down to Wilsonia?

A. Not any more than there would be any other point on the railroad.

Q. These paths that approach the right of way

(Testimony of J. E. McCutcheon.)

from the East went either directly across the right of way up the hill, or diagonally across?

A. Yes, sir.

Cross Examination.

(Questions by Mr. HAYS.)

Do you pretend to say and tell this jury that this path where the bridge is, where Evans is supposed to have crossed the bridge and come up to the track, do you want the jury to understand from your testimony that a person could have gone directly across the track and up over the hill at that point?

A. He could have gone diagonally across, as I say.

Q. What do you mean by diagonally?

A. Well, in coming here across this track, the path comes on the track like that. It runs diagonally across here. There is a trail up the embankment goes up in here.

Q. Was there at that time? A. Yes, sir.

Q. In which direction is Oswego from this point?

A. This way.

Q. Is it not a fact that at the time of the accident the track where the boy was hurt was through a deep cut, and that on the westerly side of that track there was a bank there about 15 feet high?

A. You say at the point where the boy was hurt?

Q. No, sir, at the point where he passed up the path and entered upon the right of way of the South-

(Testimony of J. E. McCutcheon.)

ern Pacific Company on the easterly track, where he was hurt?

A. That there was a deep cut? Q. Yes.

A. No, sir, there was no deep cut. There was a cut between the point where he entered and where he was struck. One path comes onto the track right at this end of the cut. The other path comes on at that end of the cut.

Q. Well, then, do I understand you to say that there is a cut from the point where he entered the track upon the path down to the point where he was hurt? Was there at that time?

A. Was there a path?

Q. No, no; was there a cut?

A. There was a cut, yes, sir.

Q. How deep was that cut?

A. Well, it was from possibly two to eight feet.

Q. From two to eight feet on the westerly side?

A. On the westerly side?

Q. Yes. On the westerly side of the company's right of way or track upon which the boy was hurt?

A. I think possibly eight feet would cover it in any point.

Q. Are you certain about that? Are you confident about that? A. Well, I am not—

Q. Is it not a fact that at some points it was 15 feet high?

A. On the new line it is, yes, sir.

(Testimony of J. E. McCutcheon.)

Q. I am speaking about the old line, and the conditions as they existed at the time.

A. No, sir, I wouldn't think at any point it is 15 feet high.

Q. Is it not a fact that at many points it was 12 feet high? A. No, sir, I think not.

Q. How high would you say it was at the highest point?

A. I don't think over eight feet at the highest point; not over 10 feet.

COURT.—How does that affect this case?

Mr. HAYS.—The only way I see it affects this case is that he swore he could travel directly over a trail up here.

A. I said the trail came diagonally across and went up the bank here.

Q. How far did this cut extend from the point where the trail is, towards Oswego?

A. It doesn't extend at all. It comes from the trail this way.

Q. It was all open up here towards Oswego?

A. Yes, sir.

Q. And the cut, then, was down towards the point where he was hurt? A. Yes, sir.

Q. How wide was it? How wide was that cut where the track was?

A. I am not positive. 16 feet is the standard. 10 feet—

(Testimony of H. N. Mooney.)

Q. Was that a standard?

A. I am not positive hether it was quite the standard. It was near that anyway. I didnt take no exact measurements.

Redirect Examination.

Q. This is your photograph in Defendant's Exhibit 7, isn't it? A. I think so, yes, sir.

Q. You were standing on that trail as it entered upon the right of way? A. Yes, sir.

Q. And the condition now is the same as it was then on the east side of the track? A. Yes, sir.

(Excused.)

H. N. Mooney, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

You are an employee of the Southern Pacific Company, are you, Mr. Mooney?

A. Yes, sir.

Q. I will ask you to tell the jury if you were with this train at the time Mr. Evans was struck.

A. I was, yes.

Q. Now, I wish you would just tell the jury all that you know about the movement of that train; how you went into Wilsonia that night, and what you were doing just before the accident. You were fireman, were you?

A. Yes, I am fireman.

(Testimony of H. N. Mooney.)

Q. And as fireman, where was your position? Where did you ride? What part of the train did you ride on?

A. Oh, I ride on the engine, of course.

Q. Now, where were you at the time and before this accident? On what part of the train?

A. I was in the cab, on the left side.

Q. Just describe to the jury what the train did, and what you saw.

A. Well, we arrived at Wilsonia on time, and it was necessary for us to make a drop of the train at Wilsonia. We dropped the engine up what is the main line now—it was the new line at that time—and let the coaches up the old main line, which is passing track now. We let them run by about—I don't know just how far they did go by, but in the clear anyway. As long as it was in the clear, that was all that was necessary. It might have been one car and might have been two. Of course, at the time I didn't pay any particular attention. And we backed up and got on the other end of the train, of course, what was the rear end coming in, and we started up slowly. Of course, we would start slow—a small engine, two cars. We hadn't gone far until we got a couple of whistles to stop—communication whistles, two. We stopped at once. Just about the time we got stopped, why, I saw this man rolling down at the side of the track. He also halloed, and we stopped right away.

(Testimony of H. N. Mooney.)

I got out of the cab and went down there. I asked him what was the matter, and he didn't seem to say very much. He seemed to be all out of wind. I could see his foot hanging up on the briers there. So I rushed back up to the cab, and got a bell-cord we had there—not a bell-cord really, but it was a small cord we had back of the seat box. And the time I got back there, why, there were several fellows there,—I don't recognize who they was now—and corded his leg up. I don't know who did the cording, but I helped. There were several there doing the work.

Q. Who gave the signal to stop, and from what part?

A. Why, I don't know anything about that. I suppose the conductor did.

Q. What part of the train did it come from, or did you know? Could you tell?

A. I don't know anything about that. Just got communication whistle—two whistles.

Q. That signal was communicated by what means? By a bell cord?

A. That is a signal cord operated by the air. It blew a little whistle in the cab.

Q. And then about how far do you think that train moved after you received that signal?

A. Well, I don't suppose it went more than probably 30 feet.

(Testimony of H. N. Mooney.)

Q. Do you know the length of those coaches—
about what they were? A. About 55 feet.

Q. How many coaches did you have in that train?

A. We had two.

Q. And what size engine did you have?

A. We had a 16x24; the smallest size we have got
on the road here.

Q. How was that engine fired? In what way?
What fuel did you use?

A. We used fuel oil.

Q. I will ask you whether or not the headlight on
that engine was burning?

A. The headlight, no, it was not burning. I had
it covered.

Q. How? A. I had the headlight covered.

Q. Just explain that.

A. Well, the headlight would be up against the
coaches now; but the rear light was open—burning.

Q. What rear light was that?

A. That would be, when we were leaving Oswego,
that would be our headlight then.

Q. It had headlight on each end?

A. Yes, sir. This engine runs both ways.

Q. Was that headlight burning?

A. Yes, sir.

Q. What kind of headlight was that?

A. Acetylene gas.

(Testimony of H. N. Mooney.)

Q. How much of a light does it give on a dark night?

A. It gives a fairly good light.

Q. I will ask you to state to the jury, if you know, whether that headlight showed any reflection outside?

A. Yes, it does.

Q. How much would it show?

A. Well, of course, that I wouldn't tell hardly; but it goes off quite a good ways from each side of the right of way.

Q. What I mean is this: Suppose a man was up the track, five or six or seven hundred feet away, and was going down towards the train, the train was backing, would a man be able to see any reflections of the headlight on the bank at the side?

A. Yes, if he was looking, he could.

Q. Would there be any difficulty about it?

A. Not a bit in the world, I don't think.

Q. Were those coaches lighted, do you recollect?

A. Yes, the coaches were lit up.

Q. Do you know, or do you recollect anything about the kind of lights?

A. Why, they are coal-oil lamps. That is, kerosene and coal-oil mixed. They are double lights.

Q. These coaches have the ordinary windows, as they are constructed?

A. Yes, they did.

Q. Now, about how far had this train moved, if you know, or had it moved at all, or any considerable

(Testimony of H. N. Mooney.)

distance after you coupled up before you got the signal to stop?

A. Yes, we had moved. We had started up—I dont know just how far; never paid very much attention, but I should not judge more than two or three cars; probably three cars.

Q. Lengths, you mean?

A. Yes, car lengths.

Q. What was the grade at that point, or do you know?

A. I don't know what the grade is. There is quite a little grade, but I don't know what per cent it is.

Q. Up or down?

A. It is up. We were climbing up.

Q. I will ask you to state to the jury whether the steam was working—you had to work steam to get up?

A. The steam was working. We were working steam, yes, sir.

Q. I will ask you whether or not the engine would puff in going up there?

A. It does, quite a bit.

Q. Would or would not a man be able to hear it at a distance of 700 feet, if he was listening?

A. I know we lay there at evening at Oswego—there's two trains pass us when we are there now—and we can very easily hear them at Wilsonia, even further than that, puffing.

(Testimony of H. N. Mooney.)

Q. The same size train?

A. Well, no, the train is larger.

Q. Take a train of two cars and an engine, would there be sufficient noise, or would there be any noise that a man could hear 600 or 700 feet, if he were listening?

A. Yes, very easy, where you are starting up that way.

Q. I will ask you to state to the jury if it was dark?

A. Yes, it was dark.

Q. If it was dark, how did you happen to see this man as you went by him?

A. Why, on an oil-burner, the fire is low down in the fire-box, and we have draught-holes all through the bottom of the fire-box here, and heading our train that way, it throws a light that way. This makes the fire in the fire-box—it shoots up onto the train.

Q. Did this man get his leg off the rail?

A. I didn't see his leg on the rail at all.

Q. You didn't? A. No.

Q. His foot was off the rail?

A. He was off the track when I saw him, rolling, coming down toward us.

Q. He hadn't yet stopped the motion that he received from the blow that hit him?

A. No; the train was just stopping when I saw him. It was already stopping, but I saw him during

(Testimony of H. N. Mooney.)

the time we were stopping and the time we got stopped.

Q. I will ask you to state to the jury what the fact is, if you know, about meeting or overtaking footmen on that track, between Wilsonia, or any point north of Wilsonia to Oswego, at night time, at that time, say at 10:45.

A. It is a very rare case that we ever meet anybody there at that time of the day.

Q. Well, at the time the accident happened, on September 25, 1909, I will ask you to state what the fact was as to the train men or yourself seeing footmen on that track, going either way, after ten o'clock at night.

A. Not very often. We hardly ever saw anybody there. Not any more there than there would be at any other point on the main line. I never happened to see very many. Once in a while you see a man walking along there, but very rarely.

Q. Now, during the daytime, and since the Beaverton-Willsburg railroad has been constructed, and since the town has been built west of there, in what they call New Town, what is the fact as to whether the travel has increased on the track?

A. Now, at that time—I am on that run at the present time, and at that time of night I hardly ever see anybody going along there.

(Testimony of H. N. Mooney.)

Q. During the daytime there are some people walking?

A. I don't know anything about that, because I don't run there then.

Q. You have the night run? A. Yes, sir.

Q. Had the night run at that time?

A. Had the night run at that time.

Q. How long have you been running there?

A. Off and on four or five years.

Q. As fireman, you sit?

A. On the left side of the cab.

Q. And have a window to look out front and side?

A. Yes, sir.

Q. And who was your engineer at that time?

A. F. S. Craw.

Q. And is he still the engineer?

A. No, I believe he has a run on the West Side now.

Q. He is still in the employ of the company?

A. Yes, sir, he is still in the employ of the company.

Q. I will ask you to state to the jury what was said by Mr. Evans at the time you got down there and spoke to him.

A. Well, he says, "Boys," he says, "this is my own damn fault," he says. "I don't blame any of you."

Q. Who was present at that time?

(Testimony of F. S. Craw.)

A. Why, I know for one that F. S. Craw was. As far as the other people, I don't know their names. There was a good many there, quite a few, but I don't know their names.

Q. How did that happen to come up?

A. Well, he voluntarily said this himself. There was nobody asked him. He also said, "This is a very expensive trip for me."

Q. Did he tell you where he had been, or anything about it?

A. No, he didn't say anything about that to me, that I heard.

Q. He was suffering, was he?

A. Seemed to be, yes, sir.

Q. What was the fact as to whether he was conscious or not?

A. He was conscious, yes.

(Excused.)

F. S. CRAW, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

Mr. Craw, what is your age?

A. 61.

Q. Where do you live?

A. I live at 280 East Second Street North, in Holiday's Addition.

Q. And how long have you been in the employ of

(Testimony of F. S. Craw.)

the Southern Pacific Company, and in what capacity?

A. A little over thirty-two years, as fireman and engineer.

Q. How long were you a fireman before you became an engineer? A. About four years.

Q. And how long have you been an engineer?

A. Something like twenty-eight.

Q. And during that time where have you performed your duties, on what parts of the line?

A. Well, I have worked on pretty near everything of the S. P. lines in Oregon.

Q. Have you worked on the Oswego branch for a number of years? A. Yes, sir.

Q. How long were you engineer on the Oswego lines? A. Something over seven years.

Q. From when? When did you discontinue your employment on the Oswego branch?

A. About fourteen months ago.

Q. Where are you working now?

A. Between Portland and Corvallis.

Q. On the West Side division?

A. On the West Side division.

Q. Moving a passenger train? A. Yes, sir.

Q. What train? A. Train 1 and 2.

Q. That is the regular passenger train, leaving here in the morning and coming back in the evening?

A. Yes, sir.

(Testimony of F. S. Craw.)

Q. Now, were you in charge of this engine, as engineer, on the evening of September 25, 1909, when Evans was run over or came in contact with the engine? A. Yes, sir.

Q. I wish you would now state to the jury, in your own way, just what you did, what the train did, just before the accident, as you came into Wilsonia. What was done?

A. We left Portland with train 41, with the engine pulling the train, for Oswego. When we got to Wilsonia we changed the engine to the other end of the coaches, and pushed the train in front of the engine from Wilsonia to Oswego, something like 1300 or 1400 feet. After getting coupled up, on the main line, getting a signal to come ahead towards Oswego, we had gone some distance when we got a signal from the coaches to stop at once, which we did. The fireman was on his seat. He put his head out of the window, and he says, "I think we have hit somebody. I saw some object going down the bank." He jumped from his seat, off the engine, and disappeared in the dark. I went to the gangway, and looked out. It was so dark I stepped back to get a light. I found the torch; had to do some little things to insure the safety of the engine—took some minute or two perhaps. By this time the fireman returned to the cab, and he says, "Give me a rope. We have run over a man's leg." I had a rope at hand, a piece of a bell-cord. It was a

(Testimony of F. S. Craw.)

stiff, clumsy rope for the work, but I had a more pliable cord in the box. I handed him this rope, and looked for the more pliable rope, which I found. As soon as I found it I started myself with the light and the rope to where at that time there was a light down the bank. I went down to where the light was, found three or four, possibly five people were there, and they were busy tying the man's leg with this rope the fireman had already taken; didn't use the one that I had. I offered it to them, but they said they were getting along nicely. About this time the conductor says, "You go back to the engine and drop the platform back to where the man is."

Mr. HAYS.—Do what?

A. Drop the coach back, the platform—that would be the end of the car that struck the man—back to where the man was, so we could put him in the car. I went back to the engine, and done as instructed, and they put him on the car. We went to Oswego, done up a little preliminaries, got ready to return as soon as possible, and came back to Portland with the man on the train.

Q. Now, Mr. Craw, I show you Defendant's Exhibit 8, which is a blue-print showing the location of the tracks out there, and I wish you would stand down here before the jury and this map. Where I am pointing is Wilsonia, this is towards Portland, this point here is the station at Oswego, and this is the

(Testimony of F. S. Craw.)

path along which the man went upon the tracks, and this is the point where it was said he was picked up or hurt, 370 feet north of this path. You are looking west. Now, these tracks that are solid here are the tracks upon which your train is supposed to have backed, and this hatched line is the present main line. Now, when you came into Wilsonia, I wish you would just show to the jury how that train was moved.

A. Making the change?

Q. In making the switches, yes, in making the changes.

A. After stopping at Wilsonia, we got a signal, and backed up over this trestle with the train coaches behind the engine; stopped at a point here, the brakeman gets down and cuts the air, as we call it—breaks the connection between the coaches and the engine. The conductor had staid at the switch. Then when we were all ready, we gave those coaches a start, cut off the engine, run the engine ahead, and the conductor, being at the switch, let us in on the other track, and the coaches up the regular main line. After they had gone by the clear, then we backed down, and came onto the main line, went up against the coaches, coupled up and got a signal. After getting the signal, we began pushing them up to Oswego.

Q. Well, now, how would they put in the clear—how would these coaches be put in the clear? How did you do that?

(Testimony of F. S. Craw.)

A. We gave them headway enough, gave them run so we could cut the engine off.

Q. That is, gave what is called a flying switch?

A. Yes.

Q. Shoving the cars, and then cut them off, and they ran in on this track? A. Yes.

Q. How far?

A. Well, that is a question, in the dark. They ran in to clear.

Q. You say "Clear"—you mean clear of the other track?

A. The other track, where the engine had to come out. They might have gone two car-lengths, possibly three. I couldn't say exactly.

Q. Then you moved your engine up, and coupled on?

A. Backed the engine past the coaches that were on the main line, until the engine was on the main line, and then headed the engine up on the coaches, coupled on the coaches.

Q. Who worked the switch?

A. The conductor watched the switch.

Q. Who was the conductor?

A. L. D. Keyzer.

Q. After he had worked the switch, did he throw it back again to get on and line up? A. Yes.

Q. Then what happened?

A. He steps right onto the pilot, because it was

(Testimony of F. S. Craw.)

right there by him, rode up to the coaches on the pilot, on the train.

Q. Then where did he go?

A. He went inside of the car.

Q. How long had he been gone inside of the cars, would you say, before you got the signal? When did you get your signal to go ahead?

A. Now, to make it plainer, in making this drop, after the brakeman had cut the air, he climbs up onto the platform. That would be between the engine and the coaches, or it would be on the coach next to the engine, where he could break this connection after giving the cars a good start; then after giving them head, as we call it, he pulled the pin, the engine goes ahead, and runs up the main line in the clear; when he clears he sets the brake behind the cars; then the engine couples, then passed over the cwitch; throws the switch, steps on the pilot, and rides up till we catch the coaches. Then he goes on the inside of the cars, and he does the coupling up of the air and things necessary.

Q. After it is coupled up, who gives the signal to go ahead?

A. In this case, the brakeman.

Q. Had the conductor gone into the car before the brakeman began to couple up?

A. Yes. He got off the pilot as soon as he touched, went right up into the coaches.

(Testimony of F. S. Craw.)

Q. What did he have on his arm?

A. He always carried a lantern.

Q. White light? A. Yes, sir.

Q. Standard lantern? A. Standard lantern.

Q. Where was he going when the brakeman was coupling up the air?

A. He went inside the car and closed the door.

Q. After he had gone inside of the first coach, started on, and after the brakeman had coupled up, coupled the hose up, and the brakeman had given you a signal to back up, how far did you move before you got a signal to stop? Two signals to stop?

A. Well, two or three cars, possibly.

Q. Quite a distance? A. Yes.

Q. About what is the length of those cars? Do you know the length of them?

A. It cannot be far from fifty feet.

Q. So you think you moved about 100—You said two or three car-lengths?

A. Two or three car-lengths.

Q. 100 to 150 feet, you think you moved, before you got the stopping signal? A. Yes, sir.

Q. Where did you get the stop signal?

A. From the coaches, the whistle was blown.

Q. Could you tell from which coach the signal came? A. No, sir.

Q. Well, then, how soon after you got the signal to stop was it that you did stop?

(Testimony of F. S. Craw.)

A. Oh, at once.

Q. How far did the train move after you got the signal, could you tell?

A. It don't seem as if it could move 20 feet, under the conditions.

Q. Could you say whether it moved as much as 20 feet, or 30 or 40, or what would be your judgment now?

A. I would say between 20 and 25 feet.

Q. How did you stop the train?

A. With the air-brake.

Q. And what was the grade? Was it going up hill at that point or not? A. It was up-grade.

Q. What would you say as to whether or not that engine, when it was going up coming into Wilsonia, and going up making this switch, whether there would be any noise or not? Would the engine make any noise?

A. It certainly would.

Q. What is the fact about working steam as it moved south towards this point where the man was struck? Was it necessary to work steam to move it?

A. Yes, sir, we were going up a slight grade.

Q. There were two coaches?

A. Two coaches.

Q. And one engine. And this engine, as I understand, had a headlight on each end?

A. Yes, sir.

(Testimony of F. S. Craw.)

Q. I wish you would tell the jury what the fact is as to whether or not the headlight of that engine would show any reflected light off to the side?

A. It certainly does, to a man in the engine.

Q. Well, I mean, suppose a man is on the track up here at this point, 370 feet away from where he was struck, and probably 700 feet away from Wilsonia down here, and was going down towards it, and the train was there at Wilsonia, and all that switching took place and the coupling up was done, I will ask you to state to the jury whether or not that man, if he had looked, could have seen that train.

A. He could have seen the lights most assuredly.

Q. I will ask you to state to the jury, if he had listened, whether he could have heard that train.

A. Yes, sir.

Q. Now, did you have or hear any conversation with Mr. Evans, when you first went down there or at any time after the accident, as to how it happened, or as to who was to blame?

A. I was there only a short time, perhaps less than two minutes. He was talking when I came in hearing, and I overheard a conversation something like that, in substance: "This has been an expensive trip for me here tonight. But," he says, "it is my own damn carelessness, and you boys ain't to blame."

Q. Now, who was present at the time you heard that conversation?

(Testimony of F. S. Craw.)

A. I know the fireman was there, and the conductor and the brakeman. They both had lights.

Q. Do you remember whether there was any one else there or not, any bystander or outsider, at the time of this conversation?

A. There were other parties there, but I don't know who, in the dark; I don't know.

Q. I will ask you if that was said while they were tying his limb or before?

A. While they was tying his limb.

Q. What was the condition? Was the man suffering apparently a good deal?

A. Yes, he must have been.

Q. Was he or not rational or conscious?

A. Seemed to be.

Q. Now, you have operated this suburban train there for about eight or nine years, I think you said?

A. Between seven and eight, sir.

Q. And as engineer all the time? A. Yes, sir.

Q. I will ask you to state to the jury what the fact is, if you know, about foot-men walking those tracks between the rails from Oswego to Wilsonia, or from Wilsonia to Oswego, after ten o'clock at night, whether there were any or not.

A. I presume I have seen them after that hour, but very rare.

Q. Now, during the daytime, and up to the close of business, working hours, what is the fact as to

(Testimony of F. S. Craw.)

the workmen at the Oswego foundry occasionally crossing that track between those points, to go to and from their work, if you know? Did you ever see them? A. Yes, sir.

Q. Now, where is most of the travel with reference to the track, crossing it or walking lengthways of it, between those points?

A. Crossing it, almost altogether.

Q. Now, I will ask you to state, if you know, whether or not there is any path leading from the point where this man entered upon the right of way, as shown here, down through that cut and on down to Wilsonia between the rails, or does the path cross over and go west, as you recollect it?

A. As I remember it, they cross almost at right angles with the track, and go on west, and go up into the wagon-road.

Q. I will ask you to state to the court and jury whether or not there is any more of a path between the rails, or was at that time, than in any other part of the main line between populous sections of the country.

A. No, sir, I don't think there was.

Cross Examination.

(Questions by Mr. LATOURETTE.)

Mr. Craw, you had an engine and two passenger coaches on this train, as I understand?

A. Yes, sir.

(Testimony of F. S. Craw.)

Q. And no baggage cars? A. No, sir.

Q. And no tender? Did you have a tender?

A. Yes, sir.

Q. Well, now, would you reverse the tender, or would that remain on the back of the engine?

A. Always at the back of the engine.

Q. Now, you didn't turn your engine around?

A. No, sir.

Q. So that when you went in there, and let these coaches go by, and then backed out, your tender was still on the back of the engine, was it?

A. Yes, sir.

Q. Toward Portland? A. Toward Portland.

Q. And the front of your engine was right up against this coach? A. Yes, sir.

Q. The end of the passenger coach?

A. Yes, sir.

Q. Coupled right on? A. Yes, sir.

Q. And you think the headlight on that end was still burning?

A. I know it was burning, sir.

Q. And was it also burning on the end toward Portland? A. Yes, sir.

Q. You had them both burning?

A. Both burning. But we always shade the one that is next to the coach, because it interferes with people inside, the light is so strong.

Q. Well, then, it was not burning?

(Testimony of F. S. Craw.)

A. It was burning, but shaded.

Q. That is to say, it was not shedding light.

A. No, sir.

Q. It was covered?

A. As soon as we coupled onto the coaches, we covered the light.

Q. Well, now, then, you didn't get any reflected light there? A. Not from that end.

Q. No, sir. And the only headlight that appeared to show was the one toward Portland?

A. Toward Portland.

Q. Now, when you made that flying switch, that was the first day, was it not, that you had used that new flying switch? A. At this point?

Q. Yes. A. Yes.

Q. At Wilsonia?

A. We make it every day, though.

Q. Sir?

A. We have made it every day afterwards, but at this point.

Q. I say at Wilsonia? A. Yes, sir.

Q. Prior to that time you had been using the one up at Oswego? A. Yes, sir.

Q. And this new one had been installed at Wilsonia because, I presume, it would be more convenient, or desirable, or something of that sort? That was the first day that you had used the new one?

A. Yes, sir.

(Testimony of F. S. Craw.)

Q. Now, isn't it a fact that the conductor had some difficulty in getting that switch to work that night? A. No, sir.

Q. Wasn't he fussing there with that switch quite a while? A. No, sir.

Q. And didn't you get behind time?

A. No, sir.

Q. Now, are you pretty sure about that?

A. Yes, sir.

Q. You think it worked all right from the start?

A. I think it was all right from the start.

Q. You might, however, be mistaken, I presume?

A. No, sir, I cannot be mistaken.

Q. Then you made the flying switch, and I will ask you to state where the engine stood with reference to the Wilsonia station when it backed in there and came up in contact with the other cars.

A. After making the flying switch, changing the engine to the other end of the coaches, we had to pass the platform some little ways.

Q. Yes, about how far?

A. Well, three or four car-lengths.

Q. Three or four car-lengths?

A. I should judge.

Q. That is your best judgment?

A. Yes, sir.

Q. You cannot tell, though, exactly?

A. No, sir.

(Testimony of F. S. Craw.)

Q. Three or four car-lengths. Then you made the coupling all right, did you?

A. The brakeman made the coupling.

Q. And the conductor was there with him, was he?

A. No, sir.

Q. Wasn't the conductor up—don't the conductor come up there with the brakeman?

A. He was in the engine, on the pilot, ready to be over the switch to the coaches. As soon as we got to the coaches, he left it and went into the coaches.

Q. I say, he was on the north platform of the first coach with the brakeman, was he not?

A. No, sir, he passed on into the coaches.

Q. Well, wasn't he there at one time?

A. Oh, he had to be.

Q. Well, then, he was there?

A. He was there.

Q. And he went into the coach? A. Yes, sir.

Q. And the brakeman finished the coupling, and gave you the signal to start? A. Yes, sir.

Q. Now, you don't know, of your own knowledge, what that conductor did after he left your view?

A. He was out of my sight, sir.

Q. You don't pretend to know one thing about whether he did his duty or not, do you?

A. No, sir.

Q. So when you got this signal to stop by these two little air pressures, you immediately applied the

(Testimony of F. S. Craw.)

brakes, I presume, and stopped, you think, within 20 or 30 feet? A. Yes, sir.

Q. What rate of speed was the train going?

A. Not very fast, sir.

Q. Sir?

A. Not very fast. Perhaps four to six miles an hour.

Q. Yes, four to six miles. That is about right, I think. Now, it would take, would it, about 20 to 25 feet to stop it?

A. Something like that.

Q. Going at that rate? A. Yes, sir.

Q. That is the reason that you judge you were going about that fast, is it?

A. Yes, sir.

Q. And that is also the reason why you think that you had gone about that far, because a train going at that rate could be stopped, and would be stopped by the application of this air, in that distance, so that your judgment is you were going four to six miles an hour, that you stopped within 20 to 30 feet?

A. Yes, sir.

Q. Then you say there was considerable light reflected out there at the side?

A. The lights were burning nicely in the coaches, they reflect out considerable.

Q. Pretty good light? A. Yes, sir.

(Testimony of F. S. Craw.)

Q. Why was it you got a torch and lit it when you got off there?

A. These lights didn't show down the bank. There is quite a bank at this place where the boy was thrown.

Q. At any rate, you thought it was better to get a lighted torch?

A. Couldn't do much good without it.

Q. What kind of a light is that torch? Explain to the jury what kind of a lighted torch you had, please.

A. All engines are supplied with torches, with a large wick, burning coal-oil, to be used after night.

Q. Well, how large a flame would that be, please?

A. The wick would be as large around as an ordinary man's thumb.

Q. And it would give a pretty decent sort of a light, would it?

A. Yes, sir.

Q. You got down with that light, and went along up the track to where this man was, did you?

A. Yes, sir.

Q. And when you got there, you saw the brakeman and the conductor there, did you?

A. Yes, sir.

Q. And they both had lanterns?

A. They had lanterns.

Q. They didn't see by any reflected light, did they?

A. Well, I don't know.

(Testimony of F. S. Craw.)

Q. Any more than you did. Did anybody else have lanterns around there, that you know of?

A. I don't think there were any other lights.

Q. Well, there was a torch that you had, and two lanterns that they had? A. Yes, sir.

Q. And they assisted this man then in binding up his leg?

A. They were working at it when I got there.

Q. And afterwards you got him in the car, did you? A. Yes, sir.

Q. You helped?

A. No, sir, I was on the engine, two cars away.

Q. You didn't wait?

A. I had to be on the engine, to move the engine, to move the car, and I didn't go back to the boy. . .

Q. And was there any physician or anybody there to take care of this man?

A. I don't know, sir.

Q. But you know that you went on to Oswego instead of coming back to Portland with him?

A. We had to go to Oswego.

Q. You had to? A. Yes, sir.

Q. Whether that man lived or died, I suppose?

A. Yes, sir.

Mr. FENTON.—If the Court please, I think that is an insinuation that is hardly fair.

Mr. LATOURETTE.—I don't know. It may be a question for the jury.

(Testimony of F. S. Craw.)

COURT.—You have not alleged any special damage on that ground?

Mr. LATOURETTE.—No, I presume not.

COURT.—I don't think that would be proper.

Q. You went up there to Oswego, and made your return trip, brought the man back down with you?

A. Yes, sir.

Q. How long were you there with your lighted torch at the place where this boy lay?

A. I don't think to exceed two minutes. Perhaps not over a minute and a half. Not long.

Q. Did you do any talking while you were there?

A. No, sir. Perhaps spoke with the conductor, was all.

Q. You spoke to the conductor. Do you remember what you said?

A. No. I know his conversation to me. I don't remember exactly my reply. He asked me to go to the engine and drop the car back to where the boy was.

Q. He asked you that? A. Yes, sir.

Q. Before you had been there very long?

A. Yes, sir, just about the time I got there.

Q. Did the conductor say anything else?

A. No, sir, not that I remember of.

Q. Did the brakeman say anything?

A. I don't think he spoke.

Q. Did you say anything?

(Testimony of F. S. Craw.)

A. I cannot just remember what I might have replied to the conductor. I know I went away to do it.

Q. Was there any other conversation by anybody while you were there?

A. No conversation, sir.

Q. Any talk at all by anybody?

A. Yes, I heard the boy talking.

Q. Oh, you heard the boy talking?

A. Yes, sir.

Q. You listened to that, did you?

A. I couldn't help it hear it, sir.

(Excused.)

Recess until two P. M.

F. S. CRAW recalled for the defendant.

Direct Examination.

(Questions by Mr. FENTON.)

Mr. Craw, I didn't ask you anything about the bell on that engine. I wish you would state to the jury what the fact is, if you recollect and know, as to the ringing of the bell while you were switching, or at any time before this accident.

A. The bell was ringing.

Q. Well, now, how does that bell operate?

A. It is an automatic arrangement; rings with compressed air.

Q. Who rings it?

A. It is on the engineer's side, as we term it.

Q. Who would have charge of the bell?

(Testimony of F. S. Craw.)

A. I would.

Q. What was the object—what is the object of ringing the bell, and where would it begin to ring, and where would it discontinue ringing?

A. Our instructions are never to move without first ringing the bell.

Q. Now, when you came into Wilsonia from the north, did you stop after you started to switch?

A. Yes, sir.

Q. Stopped the train? A. Yes, sir.

Q. Well, then, when you started up again, what was done with reference to the ringing of the bell?

A. Why, I started it at work—started the ringer.

Q. Now, let me ask you to explain to the jury the difference between an automatic engine bell, and the old cord and rope. A. We also have a rope.

Q. Well, I want to know, when you start an automatic engine bell to ringing, whether it will ring until something is done.

A. Yes, sir, at all times.

Q. Just explain to these men how that works.

A. It is a little air-engine, that works the compressed air. When the air is turned onto the ringer, it rings the bell, and when it is turned off, it stops the bell.

Q. Where, in the operation of this train as it was at that time, was it proper to ring this bell, or to dis-

(Testimony of H. N. Mooney.)

continue it? How continuously was that bell rung up to the time of the accident?

A. Why, it was ringing before we started to move, and all the time after, until we got to Oswego.

Q. Then, do I understand you as saying that it was ringing while the train stopped there where this accident occurred?

A. Yes, sir, all the time.

Q. Well, was it so that anybody could hear it that listened?

A. Pretty good bell. It is a pretty good bell, as I remember it.

Q. The ordinary engine bell for that purpose?

A. Yes, sir.

Cross Examination.

(Questions by Mr. LATOURETTE.)

How long did you run that engine?

A. That particular machine?

Q. Yes.

A. It would only be from memory, but I should say two years; possibly more.

(Excused.)

H. N. MOONEY recalled for the defendant.

Direct Examination.

(Questions by Mr. FENTON.)

Mr. Mooney, what have you to say about whether that bell was ringing, and what kind of a bell it was, at and immediately before this accident occurred?

(Testimony of H. N. Mooney.)

A. Well, it was ringing.

Q. What kind of a bell is it?

A. Well, it is an ordinary engine bell, I presume.

Q. Did you have anything to do with operating it, or who operates it?

A. Why, I do, excepting in a case of this kind, where he turned on the air—rings it automatically.

Q. What is your recollection as to when that bell started to ring and when it discontinued ringing?

A. He commenced ringing it as soon as we commenced switching, after we had pulled up at Wilsonia and let the passengers off.

Q. And for how long did it continue ringing?

A. Until we got to Oswego.

Q. Is there any whistling-post there that you recognize in coming into Oswego with this suburban train?

A. What is that?

Q. Is there any whistling post you recognize, and whistle at, coming up past Wilsonia on the suburban trains?

A. Yes, sir, there is a crossing whistle there.

Q. Where is that located?

A. It is located, if I remember right, just about where this man was hit.

Q. A crossing whistle?

A. Yes, that is, a crossing whistle for the crossing beyond Oswego.

Q. It is a post that is there, or a crossing?

(Testimony of H. N. Mooney.)

A. It is a post and whistle—whistle crossing—just a sign post.

Q. And what is that for?

A. That is for the crossing on beyond Oswego.

Q. Oh, I see, the other side of Oswego? A. Yes.

Q. Now, if a train was not going through Oswego, but was going to stop at Oswego, would that whistling post be recognized?

A. No, sir, that would not be recognized.

Q. Then, there was no whistle sounded there?

A. No; no whistle sounded.

Q. And you never did with a suburban train?

A. Never did with a suburban train.

Cross Examination.

(Questions by Mr. LATOURETTE.)

How many passengers stopped off at Wilsonia that night?

A. I couldn't tell you how many.

Q. Your recollection is not very good about any of these facts, is it?

A. That is not my part of the business. In fact, I wasn't on that side, anyway.

Q. What is that?

A. That was not on my side of the engine, anyway.

Q. You didn't notice?

A. I didn't see them at all.

Q. Well, now when you reversed that engine—

(Testimony of H. N. Mooney.)

that is to say, when you made that switch, got the engine on the other end of the train, why, all you had to do was to fire from there on to Oswego, wasn't it?

A. Fire and look out; that is all.

Q. And do what?

A. Look out for signals, or anything that might be in the way, or anything like that ordinarily.

Q. Look out for signals?

A. Yes, look out for signals or anything else.

Q. You are on which side?

A. I am on the left-hand side going up.

Q. On the side next the river? A. Yes, sir.

Q. What signals would you expect to find between there and Oswego?

A. I wouldn't expect to find it.

Q. Why do you say you are looking out for signals?

A. Because we always look out. It is part of the business to watch out.

Q. To look out to see if there was any cattle or anything?

A. Yes, to look out at all times.

Q. There was cattle running across on the commons?

A. I never saw any. Oh, that commons, yes, I have seen stock on there.

Q. I mean between Wilsonia and Oswego—that is all open there, and cows running there?

(Testimony of H. N. Mooney.)

A. Oh, I have seen cows running there, yes.

Q. It is your business to look out for stock?

A. Look out for stock, yes, and everything else that might be on my side.

Q. It is your business to look out for people, too, isn't it? A. Yes, look out for people.

Q. That is the only kind of signals you had to look out for?

A. Well, no, there's a whole lot in the operating of the train you have to look out for.

Q. What else?

COURT.—I think he has gone through that.

Q. Those were the two principal things you looked out for, the cattle and the people?

A. I don't know as it is. There is other things just as important.

Q. That is at least part of your duty, was it?

A. That is part of my duty, yes.

Q. Now, do you know whether the bell was ringing automatically, or by the cord?

A. It was ringing automatically, yes.

Q. Did you put the air on?

A. No, sir.

Q. Do you swear that you remember of the engineer's putting it on?

A. Yes, I do swear to it. I positively know.

Q. Was that any part of your duty?

A. No, sir.

(Testimony of J. M. Coon.)

Q. To watch him? A. No, sir.

Redirect Examination.

Q. Your looking out there was the same as elsewhere on the track? A. Sir?

Q. Your looking out there was in the performance of your duty, the same as elsewhere?

A. That is the performance of my duty, yes, sir.
(Excused.)

J. M. COON, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

What is your business, Mr. Coon?

A. Well, I am with the Liberty Coal & Ice Company at the present time, looking after the barn for them; might say hostler.

Q. And were you at Oswego on the evening of September 25, 1909, when this young man was run over?

A. I was up there that evening, but whether it was on September 25th, or what it was, I wouldn't swear.

Q. Well, you remember the circumstance?

A. Yes, sir.

Q. Of this young man being run over, and being brought up to the station?

A. Yes, sir.

Q. By the train men on the car? A. Yes, sir.

(Testimony of J. M. Coon.)

Q. I wish you would just tell the jury how you happened to be there.

A. Well, I lived up there at that time, and I went home; at least, I think I went home that night, but I won't be positive. I used to go up there quite often to lodge. I belonged to a lodge or two up there. I either went home or went up there—I went up on the 6:25 car, and then come back on the 10:45. That is the way I happened to be there.

Q. You were a passenger, intending to come to Portland from Oswego? A. Yes, sir.

Q. Now, I will ask you to state to the jury whether you were at that time in the employ of this company, or whether you ever were in its employ, or whether you are now, or ever have been.

A. No, sir, I never have been in the employ of the Southern Pacific Company, if that is what you mean.

Q. Yes, that is what I mean. You have not had any employment with the Southern Pacific Company at any time? A. No, sir.

Q. And you have not been in the employ of any railroad company?

A. Well, not for years. I worked a little while for the Great Northern at one time, but then that is 20 or 25 years ago, in Minnesota.

A. A short time? A. A short time.

Q. But your business has been since that time for other people, in other lines? A. Yes, sir.

(Testimony of J. M. Coon.)

Q. Now, do you recall this young man Evans being in the coach when you boarded the train, and entered the car at Oswego?

A. I think when I first saw him he was on the back platform of the rear coach. I don't think they had carried him into the coach yet. They had put him on there and brought him out to Oswego, and they waited there for a cot or something to put him on and bring him to town; and they put him on after he got there. But I wouldn't be sure whether he was in the coach or just on the platform when they got there.

Q. I want you to tell the jury what conversation, if any, you heard him—what you heard him say, in the presence of yourself, and I think the conductor, Mr. Kayzer, or any one else, when you went into that coach on that evening, as you were starting to go on to Portland.

A. Well, I think the conversation he had with Mr. Keyzer was before we started to go to Portland, was while we was in Oswego, as near as I can remember.

Q. Who was Mr. Keyzer?

A. Mr. Keyzer was the conductor.

Q. Now, then, just state to the jury who was present at that conversation, and what was said.

A. Well, I couldn't tell who all was present, but I think the engineer and fireman were in there, and

(Testimony of J. M. Coon.)

the conductor, and I don't know whether the brakeman was there or not; but there was people around there—I don't know who all. But Mr. Keyzer was asking him questions about where he was, where he lived, and about him, and if he blamed the trainmen. And he said, No, it was his own damn fault; he had no business running after the car. That is what I think, just the expression he used.

Q. Did you live at Oswego during the few years preceding this accident, you say?

A. Yes, sir, for about fifteen or sixteen years.

Q. Now, I will ask you if you were familiar with that track from Oswego north towards Elk Rock?

A. Well, yes, sir, considerably so.

Q. I will ask you to state if you know about where the foundry is, and the barn of the Oswego Iron Company, down under the hill there.

A. Well, I know exactly where the foundry is, but there was no barn there when I was there; but I think it was what they use for a barn now they used for a hay-shed when I used to work. I worked for about five years at the foundry.

Q. Something has been said in the evidence of certain paths leading from that foundry, or that vicinity, up to this right of way, and across the track. Do you recall these paths? A. Yes, sir.

Q. Where do those paths go with reference to the track? Across it, or lengthways of it?

(Testimony of J. M. Coon.)

A. Well, they go across it.

Q. I will ask you to state to the jury who used those paths generally.

A. Well, the employees of the company, of course; that is, of the Iron Company. I suppose other people walked up and down there, too.

Q. I will ask you to state to the jury what the fact is, if you know, about whether or not there was any travel after 10 o'clock at night, between Oswego and towards Elk Rock, down where Wilsonia now is, between the rails—using that as a footpath.

A. Well, I never was there after ten o'clock at night, and couldn't say. That is, I don't think I ever was there that late in the evening.

Q. Well, after dark, was that track used as a footpath by the people, lengthways?

A. Well, I don't know. I think it was used to a certain extent, yes. I know it was used in the daytime, and I think people that lived down that way went up and down the track after night, as well as daytime, to keep out of the mud in the winter-time, and out of the dust in the summer-time.

Q. Now, these paths that you speak of, those, I understand, all cross the track?

A. Yes, sir, they all cross the track. That is, all that I know anything about.

Cross Examination.

(Questions by Mr. LATOURETTE.)

(Testimony of J. M. Coon.)

Mr. Coon, what do you say your occupation is?

A. I am taking care of the stock for the Liberty Coal & Ice Company at the present time—their horses. Looking after their barn.

Q. Looking after the barn? A. Yes, sir.

Q. Working by the month?

A. Yes, sir, working by the month, or day, or week, or whatever you have a mind to call it. I get my pay every Saturday night.

Q. You are not in the employ of any railroad company? A. No, sir.

Q. Have any relatives that are in the employ of the company? A. Not that I know of.

Q. Are you and Mr. Keyzer, the conductor there—what is his name—Keyzer?

A. Keyzer is the conductor, yes, sir.

Q. Have you and Keyzer been pretty good friends?

A. Well, nothing more than I know him, as he has been conductor on the road, was there for years, when I was living in Oswego, and I used to ride up and down with him. No more friends than anybody else.

Q. Not especially friendly to him?

A. No, sir, no more than other people.

Q. Nor to any of these other employees?

A. No, sir.

Q. Not in any way related to them?

(Testimony of J. M. Coon.)

A. No, sir.

Q. Now, just please tell the jury again what you heard Evans say there at Oswego.

A. Well, I heard him say that—Mr. Keyzer, I think it was Mr. Keyzer, I am pretty sure it was, asked him questions, and asked him if he blamed the railroad men for it. And he says, “No, I don’t blame you fellows. It is my own damn fault.” Something just similar to that. That was the words he used. I know that was the words he used; that he had no business running after the train.

Q. Something similar to that?

A. Well, that is what he said. That is the words he said, but I wouldn’t be positive to the questions that was asked him.

Q. Keyzer asked him if he blamed the railroad men?

A. Yes, I think it was Keyzer. I am pretty sure it was—the conductor.

Q. That was the railroad men, I suppose, the conductor and engineers?

A. The conductor, yes; of course, if he blamed those fellows.

Q. Keyzer asked him if he blamed the railroad men?

A. The railroad men, yes—the men that was on the train, of course. It was not the company, I don’t

(Testimony of J. M. Coon.)

suppose. He didn't say anything about the railroad company.

Q. He said what?

A. It was his own damn fault. That is the words he used—I am sure it is.

Q. You know Mr. Elston? A. Yes, sir.

Q. Was Mr. Elston there?

A. I don't know whether he was or not. He was there that evening—I know that. But whether he was right there when it was said or not—the train was waiting for them to get a cot, or something, for them to bring the boy down on, and it was during this time when this conversation occurred.

Q. How long before the train started back?

A. Well, it couldn't have been only just a few minutes. The train was a little behind time. They were a little late when they pulled into Oswego.

Q. You know that?

A. I know that. Because I was waiting for the train, and some people there, who was standing around, heard them making the fly down at Wilsonia, and they said, "I wonder if they ain't coming to Oswego this time."

Q. You knew the train was late?

A. I knew the train was a little bit late.

Q. How much was it late?

A. Oh, probably it got into Oswego five minutes late—later than usual.

(Testimony of J. M. Coon.)

Q. You were waiting there for it?

A. Yes, sir, I was waiting there for it.

Q. And when they got there, did they hurry to get out, to get back?

A. No, they didn't hurry up, because they waited for something to put the boy on to bring him to town. They had to go up into town to get a cot or something to bring him in on.

Q. This conversation was at the back end of the rear coach?

A. It was in the rear coach; I think just inside of the coach.

Q. It was up inside of the coach?

A. I think so, yes, sir.

Q. And the conductor was there—conductor Keyzer?

A. Conductor Keyzer was there. I am sure of that. He was the man that was talking to the boy.

Q. And the engineer was there?

A. I think so.

Q. And the fireman was there?

A. I think so, yes, sir. I remember they were in the coach at that time, that is, at the time they were waiting there they were in the coach.

Q. And you think the brakeman was there?

A. I don't know whether he was or not, but I think there was somebody else there, too—I don't know—there was quite a crowd there.

(Testimony of J. M. Coon.)

Q. How much of his time did that engineer spend back in that coach there?

A. I couldn't say that.

Q. And the fireman?

A. How much time they spent there? They might have been there five minutes. They might have been there less than five minutes.

Q. Did they hear this talk? Did they hear what Evans said?

A. I think they did—I don't know. They were there, that is, during some of the time, but whether they heard what he said then, I don't know.

Q. The conductor was there, and the engineer was there, and the fireman was there?

A. Yes, they were in the coach during the time that they were stopped there; but whether the fireman and engineer was there when he made this statement or not, I would not be positive; but they were there during the time.

Q. You said a little while ago they were there?

A. I said they were in the coach, yes, sir, while it was standing there.

Q. I suppose Evans was laughing and joking about it, and he was in no pain at all?

A. No, I don't think he was laughing and joking at all. He was answering the questions. He seemed to be rational, but of course he was under a great strain.

(Testimony of L. D. Keyzer.)

Q. Suffering quite a little?

A. I have seen quite a few men a little after they were hurt, and I thought he displayed the best nerve of anybody I ever saw.

Q. And he didn't want to blame the train men?

A. No, sir. He said that at the time. Whether he really knew what he was talking about or not, I don't know. I wouldn't say he did.

Q. You wouldn't say he knew what he was talking about?

A. No, sir, I wouldn't swear positive that he knew what he was talking about.

(Excused.)

L. D. KEYZER, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

You were the conductor, Mr. Keyzer, in charge of this train on the evening of September 25, 1909, when Evans was run over? A. Yes, sir.

Q. How long had you been in the employ of the company at that time?

A. Since November 2, 1889.

Q. And in what position?

A. First as brakeman, and then as conductor.

Q. How long have you been a conductor of passenger trains?

A. Something like eight years.

(Testimony of L. D. Keyzer.)

Q. And between what points have you acted as conductor?

A. Well, when I was running extra, I went on all divisions.

Q. How long have you been on the line between Portland and Oswego?

A. Something like four years.

Q. And you are still there? A. Yes, sir.

Q. Operating as conductor? A. Yes, sir.

Q. Now, Mr. Keyzer, at the time that this accident occurred, what train was it you were operating?

A. Oswego local.

Q. What do you call that train? What is its number? A. 41.

Q. And where did that train run? Between what points?

A. Between Portland and Oswego.

Q. How many trips a day?

A. Thirteen round trips.

Q. What time did it begin and what time did it quit?

A. 5:30 in the morning to 12:25 in the evening.

Q. What was the last trip in from Oswego?

A. 12 o'clock.

Q. What hours were you on?

A. From 3:30 until 12:25 P. M.

Q. You took the last half of the day?

A. Took the last half, yes, sir.

(Testimony of L. D. Keyzer.)

Q. From what time did you say?

A. 3:30 to 12:25.

Q. Were you familiar with the situation at Wilsonia, and the tracks, and all the situation there, at the time of this accident and for three or four years before?

A. Yes, sir.

Q. I wish you would explain now, in your own way, tell this jury how you came into Wilsonia, what you did up to the time of the accident, explaining fully without my asking you further questions, if you can.

A. We arrived at Wilsonia on time, about 10:34. On account of the company changing the line at Oswego—which is called the Willsburg cut-off—it was necessary to drop the coaches at Wilsonia and shove them up to the depot at Oswego, because we could not make the switch at Oswego, as we did heretofore. We made the drop at Wilsonia, and we backed the train over the trestle at Wilsonia, and the brakeman rode the rear end back over the trestle, and then came up forward and cut the hose. There is two hose—the air hose and signal hose, and you have got to turn four anglecocks to do it. While he was backing up and working that hose, I worked the switch this way, to be at work properly, because it is always customary to work the switch before you make the fly, because if you don't you are liable to ditch the cars. There may be a gravel between, and if there is you

(Testimony of L. D. Keyzer.)

cannot throw it, so it is customary to work the switch before. So the brakeman hallooed, and I gave him a lantern to come away. We dropped the cars something like 20 feet into the clear. I threw the switch up for the main line, give the engineer the signal to back up, we headed in on the coaches. I rode the pilot in. Coupled up to the train. Before they coupled up, I dropped off the pilot, jumped upon the steps of the rear coach, and went through the train to the front platform. When he coupled up, and the air released, the brakeman gave a signal to come ahead. Of course, I could not see what he was doing—I was up ahead. We went ahead, I should judge, between four and five car-lengths, as near as I could estimate the distance. And in the shadow of the darkness I saw two men coming down the track, and they were running, and I called to them to look out for the cars, the train is backing up. And one of the men got off the track, and as he did, he spoke to his partner,—I didn't know who they were at that time—to get off the track; and his partner used some profane language, something like saying he would catch them anyway. But I saw he was not going to get off the track, and I reached up and stepped on the threshold of the door—I had to reach the cord; it is about four inches higher than the platform, the threshold is, and it makes it easier to reach the cord. So I stepped on the floor and stepped on the threshold, and gave two

(Testimony of L. D. Keyzer.)

jerks. That means stop at once. It blows a little whistle in the engine. And just before we stopped we caught this Mr. Evans right in the face, right here, struck him on the face with the corner of the car, and he did fall down outside, over the rail, and one pair of wheels went over his leg, because I could feel the jar of the cars as it went over. And I says to myself, "We have got somebody's leg." And we stopped in about 30 feet, I judge, 30 or 40 feet. And we got out as quick as we could. He was down in the brush. He jumped, of course, on account of the pain, he jumped like a chicken with his head off. We jumped down and picked him up. The fireman came down there, and Mr. Emmett was there. Somebody suggested a rope, so he would not bleed to death. Mr. Craw went into the engine and got a rope. We tied his leg up as tight as we could, and brought him into the coach. After backing up so the platform would be right opposite where Mr. Evans lay, we carried him in there, and in there I asked him what was the reason he was running—was somebody after him? I supposed somebody was chasing him, because I couldn't understand why they was running down the track that way, at such a speed. And he says, "We were trying to catch the train at Wilsonia, supposing it was going to leave from there." And I think I asked him if anybody informed him that the trains did not come back to Oswego any more. I says, "Who

(Testimony of L. D. Keyzer.)

do you blame for this?" He says, "I don't blame anybody but myself." He says, "It is my own damn carelessness. Some more of my bad luck." But he used profane language in there.

Q. Now, Mr. Keyzer, at the time you went from the steps of the rear coach next to the pilot, the two coaches were coupled together? A. Yes, sir.

Q. And you left the brakeman in the act of coupling up the air between the pilot and the rear coach?

A. Yes, sir.

Q. Then you went, as I understand, into the first coach? A. Yes, sir.

Q. Through that into the second coach?

A. Yes, sir.

Q. Which would be the coach ahead?

A. Yes, sir.

Q. As you were going back up?

A. Yes, sir.

Q. Now, did you notice Mr. Elston? Are you acquainted with Mr. Elston? A. Yes, sir.

Q. Do you remember seeing Mr. Elston in the rear coach?

A. On the front platform of the rear coach, between the cars.

Q. Oh, you saw him as you went through there?

A. Yes, sir.

Q. Where was he?

(Testimony of L. D. Keyzer.)

A. Standing to the right of the door, on the platform.

Q. Between the two cars?

A. Between the two cars.

Q. Well, now, at that time—what did you do when you passed him there? Where were you going?

A. Going up to the front end, the front platform.

Q. When you say front platform, you mean the one that is nearest to Oswego? A. Yes, sir.

Q. As you were intending to back up?

A. Yes, sir.

Q. Now, what was your object in going up there?

A. Simply to be on the front end before backing the train, is all.

Q. Did you go onto that platform before you began to back that train? A. Yes, sir.

Q. What did you have on your arm, if anything?

A. A lantern, white lantern.

Q. When you say white lantern, what do you mean by that?

A. Regular signal lamp which railroad men carry; company lamp.

Q. Was it lighted? A. Yes, sir.

Q. What kind of a light does it give?

A. Fairly good light.

Q. Now, then, something has been said in the testimony here, and in statement of counsel about marker lights. I wish you would tell the jury what mark-

(Testimony of L. D. Keyzer.)

er lights are for, and who handles them, and when they are to be put onto the train in those circumstances.

A. Marker lights is green and red light, combination light. They are about this tall, and weigh ten or fifteen pounds apiece, and they are on the rear of the train, passenger and freight trains, to indicate the rear of the train. The red light is on the rear one, to avoid trains from running into it. And that is all marker lights are used for.

Q. I will ask you to state to the jury whether or not those marker lights are intended to be on a car that is backing, or whether they are intended to be on a car that goes ahead.

A. They are intended to be on a car that goes ahead. That is what they are for.

Q. If I understand you, they are lights between stations?

A. They are lights between stations, yes.

Q. They are red behind and green in front?

A. Red behind always; green in front and green to the side.

Q. Suppose those marker lights had been on and an employee had seen them, that was familiar with the company's rules and management, had seen those marker lights on there, and had been south, in this instance, we will say, towards Oswego, from the train, and marker lights had been up, what would that em-

(Testimony of L. D. Keyzer.)

ployee have understood by those marker lights, with reference to which way that train was going to go?

A. Why, I should think he would understand that it was leaving town.

Q. Going to Portland?

A. Going away from the place, yes.

Q. And if the lights in those circumstances had been back—if the train had been backed with the lights in that position from the employee, the employee would be deceived, would he?

A. He would be deceived in that case, yes, sir.

Q. I will ask you to state, if you know, what object there is in having a man on the rear of a car with a light when the train is backing. Does it have any relation to crossings, or yards, or anything of that kind?

A. Not to my knowledge.

Q. That was the rule, or rather that was the method by which you were to move the train backwards?

A. In switching or making up cars, I don't think it is necessary.

Q. But after you get done switching, though, you are supposed to be on the rear of the car with a lamp?

A. It is proper to be on the front end, yes.

Q. Now, I will ask you to state if you are familiar with those paths that lead up and across the right of way at those points, leading from the foundry. Do you know about them?

A. I saw them, yes, sir.

(Testimony of L. D. Keyzer.)

Q. Where do those paths lead, across the track or lengthwise of it? Those paths, which way do they go?

A. They must go across. They did go across.

Q. I will ask you if you have noticed some travel on the tracks, between the rails, between Wilsonia and Oswego, up to the time of this accident, after six o'clock at night, or after dark?

A. I never noticed anybody there, no, sir.

Q. Who used these paths going across the track?

A. Men employed by the Oregon Iron & Steel Company, at the foundry.

Q. Well, were there or not, during the daytime, people who walked on this track, lengthwise, from Oswego north, during the day-time?

A. I think some of them did, yes.

Q. You went on in the afternoon at 3:30?

A. 3:30.

Q. And you staid until what time?

A. 12:25 in the morning.

Q. That was the last train north—was that the time-card at that time?

A. That was the arrival at Portland, yes, sir.

Q. Then I will ask you to state to the jury whether there was any more travel between Wilsonia and Oswego at that time and before than there was from Wilsonia north on the track, towards Elk Rock. I

(Testimony of L. D. Keyzer.)

mean, by foot-men going back and forth on the track. How was the travel—more or less?

A. The travel was just about the same. People are continually walking the track anyway, as far as that goes, in all points. It is nothing uncustomary to see a person there on the track. And they didn't travel there any more than they did any place else, as far as that goes.

Q. Can you tell from this map about how far north of where that path is that has the bridge and the big iron pipe down the hill below the track—how far north of that point it was to where Evans was struck?

A. Well, the way I look at it, it looked to me like being about 250 or 300 feet, if I am satisfied where he came out.

Q. Just stand here before the jury, and I will show you the blue print.

A. I may not know what path he came out of.

Q. Defendant's Exhibit 8 is a blue-print which shows at this point Wilsonia. Here is the platform.

A. That is Wilsonia?

Q. Yes. Here is the station platform up at Oswego, and this is the path and bridge up which it is admitted that he came onto the track, and this is the track that you were using at the time. Here is the switch, you see?

A. Yes.

(Testimony of L. D. Keyzer.)

Q. Now, this is the point there indicated where he was picked up—found.

A. Yes.

Q. A distance, according to the scale, of about 370 feet. Now, what is your recollection of the distance from that point north?

A. Well, I should think it was about 300 feet, the way I look at it. I didn't measure it.

Q. You remember the path, do you?

A. I remember the path, yes, sir.

Q. Now, assuming that he came out up that path, and got onto the rails at that point, your judgment was it was at least 300 feet down the track to the point?

A. To where we hit the boy, yes. Is this where he was picked up?

Q. There is where he was struck. That is what it is supposed to be. Do you recall whether or not there was a cut along there on that curve, on the East side.

A. Yes, sir.

Q. Can you give the jury an estimate of about how deep a cut it was? Suppose a man was in it on the rails, how would the level of the cut be with the top of his head, if he was a six-foot tall man, like I am?

A. Well, to the right of the track, to the west of the track rather, it would not be much higher than your head.

(Testimony of L. D. Keyzer.)

Q. To the east of the track?

A. To the east of the track it slopes up ten or twelve feet, something like that.

Q. Has there been any material change east of the track since that time?

A. Yes, that has all been cut out of there.

Q. East, next to the river?

A. Oh, no, nothing done.

Q. To the west of the track?

A. It has all been excavated.

Q. Would you recognize the general looks of the country, and does Defendant's Exhibit 7 show the slope of the hill east of the track, that is, towards the river, at about the point where this path comes up to the tracks? You recognize that, do you?

A. Is that where he claims he came up?

Q. Here is the track. This is the point where it is claimed he entered on the track. Here is the bridge down here. That is East, looking towards the river. This is looking north towards Portland. I ask you if you recognize that as showing the looks of the country east of the track, towards the river, as it is now?

A. Well, yes, that is quite a good picture.

Q. Now, Mr. Keyzer, I will ask you if you recollect hearing the bell on that engine on that evening at any time shortly before or during the accident? What is your recollection about that?

(Testimony of L. D. Keyzer.)

A. Yes, sir, the bell was ringing all the time, continually.

Cross Examination.

(Questions by Mr. LATOURETTE.)

Mr. Keyzer, you say that you were out on the front end of that coach there before the train started?

A. Yes, sir.

Q. With your light? A. Yes, sir.

Q. You are sure about that, eh?

A. Quite positive, yes, sir.

Q. And you are quite sure that you continued to remain there until after the boy was struck?

A. I had no occasion to go in again.

Q. Well, did you go in? A. No, sir.

Q. How long a period of time elapsed between the time that you went out on the front end before the train started and the time when the train struck the boy? Now, how long a time was that?

A. It could not have been very long, because we only went four or five car-lengths. It could not have been over a minute and a half—something like that.

Q. You are quite sure that you were standing out on the end of the coach there next to Oswego, with your light, while the train was going four or five car-lengths before it struck the boy?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

(Testimony of L. D. Keyzer.)

Q. You don't think you could be mistaken about that?

A. I know—I am satisfied I am not mistaken.

Q. And your lantern was burning brightly?

A. Brightly, sir.

Q. That was your duty to do?

A. That was your duty, to be there.

Q. You did your duty?

A. Naturally would.

Q. When Mr. Worthington said that you had just reached the door and opened it, and stepped one foot out there on the platform when he heard you halloo, he is mistaken about that, is he?

A. He must be mistaken; must be mistaken; because one cannot see out of the darkness. The minute you come out of a lighted car you can't see nothing. You must be out there a minute before you can see anything, out of a lighted room, on account of the darkness.

Q. You saw Evans coming? A. Yes.

Q. How far was he away on the track?

A. Not over 20 or 25 feet—something like that—because you couldn't distinguish anything, on account of the darkness, until the rays of the window-light fell on the track; then you could see. Then you wouldn't be positive it was a man.

Q. You are quite sure, then, that you saw Evans 20 or 25 feet away?

(Testimony of L. D. Keyzer.)

A. 20 or 25 feet from the rear end.

Q. How far away was he when you halloosed to him to look out?

A. He couldn't have been over fifteen feet—something like that—because I was not positive it was anybody when I first saw the shadow.

Q. If he heard you halloo fifteen feet away, he ought to have got off, with that train running four to six miles an hour?

A. Mr. Emmett got off. I didn't understand why Mr. Evans didn't get off. That is what puzzled me, when I saw he was not going to move to get off, so then I pulled the bell.

Q. Emmett was behind Evans?

A. Emmett was a short distance behind, but not very far.

Q. About 10 or 15 feet?

A. I don't think he was that far.

Q. Now, isn't it a fact that you came out there, and stepped out onto that platform holding the door here in one hand—just stepped out there and flashed your light out there, and that you saw Emmett instead of Evans, and that the car had just instantly struck Evans as you stepped out? Now, isn't that the fact?

A. No, sir.

Q. You are sure you saw the two of them?

A. I saw both of them, yes, sir.

Q. The first was at least 15 feet away?

(Testimony of L. D. Keyzer.)

A. I don't think he was that far.

Q. You said that, didn't you?

A. I thought you meant separate from each other.

From the rear end?

Q. No, I say from you—from the car.

A. At least 15 feet from the car, yes, sir; and he was looking down at the track—he was not looking at the train. He was looking down at the track, and was not looking at the train at all—just hammering it along—for fear he would fall down.

Q. Could he see the track?

A. I guess he saw the track all right, because he was watching his feet so he would not fall. It wouldn't have made any difference if the train had been afire, he wouldn't have seen it.

Q. You think if you had been in Evans' place you would have had ample time, after the conductor came out there, to have got away before the train hit you?

A. I am satisfied I would, yes, sir.

Q. And you swear positively that you was on the back platform?

A. I swear positively that I was on the back platform.

Q. On the front platform of that back coach when the train started to move on?

A. Yes, sir.

Q. With your light?

A. Yes, sir.

(Testimony of L. D. Keyzer.)

Q. And that the train had gone three or four car-lengths before it hit the boy?

A. Three or four car-lengths before it hit the boy.

Examination by the court.

Q. Mr. Keyzer, did you get out on the back platform before the train started to move, that the train was coupled on? A. Yes, sir.

Q. You were out there before it started to move at all? A. Yes, sir.

Q. Who coupled the engine onto the car?

A. The brakeman coupled the engine onto the car, and then coupled the car. There's two hose to couple, and four anglecocks to turn. And while he was doing that, I was walking through the train to get to the front end.

Q. You got out there before the train started to move? A. Yes, sir.

Q. With your light?

A. Yes, sir, white light.

Cross Examination Continued.

Q. How long does it take to couple that engine on to those cars?

A. Oh, I don't know as I ever timed myself coupling those couplings?

Q. How long?

A. I don't think I ever timed myself coupling those couplings. They couple quite easy sometimes,

(Testimony of L. D. Keyzer.)

and sometimes they don't. It may take half a minute.

Q. Half a minute?

A. Something like that. It may be a minute.

Q. When the engine came up to those two coaches, you were on the pilot of the engine? A. Yes.

Q. And you stepped up onto the platform of the first coach? A. Yes.

Q. And the brakeman coupled—made the coupling?

A. He was standing on the ground. That is the way they couple.

Q. You went on through those two coaches?

A. Yes, sir.

Q. To the front end? A. Yes, sir.

Q. This brakeman would give the signal to the engineer to start, wouldn't he?

A. Yes, sir, after he coupled up.

Q. How would this brakeman know whether you had reached the other end of the train or not, before giving a signal?

A. He just figures on time, and he knows that I am there. It is just about how long it takes me to go through.

Q. He made a guess at that?

A. He made a guess at that.

Q. He guessed it right that night?

A. He guessed it right that night. We always

(Testimony of L. D. Keyzer.)

have that figured down pretty close, because we do it every day, and it is no trouble at all.

Q. I know you all try to do your duty. There is no doubt about that. That was the first day, however, that you had made that flying switch, wasn't it?

A. It is the second time we made the drop there.

Q. That was the first day and the second trip?

A. The first day and the second trial, yes, sir.

Q. And isn't it a fact that you were detained there somewhat?

A. Not over five minutes, no, sir.

Q. Well, five minutes is considerable in railroad matters sometimes, isn't it?

A. You must remember we was due in Oswego at 35, and five minutes making the drop, and ten minutes dead time. We were due at 35 and not at 45. So there is ten minutes we had for our switching. So you cannot call the train late. If we hadn't struck Mr. Evans we would have been right down there at 10:45.

Q. I think you stated you were out there about a minute and a half on that platform before the train started?

A. Oh, I don't know as we was out there that long. It wouldn't take that long to run that far, would it?

Q. Didn't you say that? Perhaps I was mistaken about what you said.

A. Run four or five car-lengths—whatever time it

(Testimony of L. D. Keyzer.)

took to run four or five car-lengths, is the time I was out on the platform.

Q. That is, before the collision?

A. Before we struck Mr. Evans.

Q. You think if you had been in the boy's place, you would have got off all right?

A. I am satisfied I would. I am satisfied he would, too, if he was looking at the train, but he wasn't looking at the train. He was looking at the track.

Q. What did the boy do when you halloeed to him?

A. Why, he didn't say nothing to me, but Mr. Emmett spoke to him about the same time I did, or right after. He said something to Emmett. I thought he swore, but what he said I didn't hear.

Q. He just stood there looking at you, and swore, and didn't get off.

A. He didn't look at me, at nothing only the track.

Q. Did you halloo loud enough so he could hear you?

A. Plenty loud enough.

Q. Did he hear you?

A. I don't know. He says he didn't.

Q. You heard him say his hearing was good?

A. Mr. Emmett heard it.

JUROR.—Did he speak when you halloeed?

A. No, kept right on running.

(Testimony of L. D. Keyzer.)

Q. (Mr. Hays) Did I understand you to say he kept right on coming towards the car?

A. Kept coming towards the train, yes, sir.

Q. Was he running? A. Yes, sir.

Redirect Examination.

Q. I didn't ask you, Mr. Keyzer, about how those coaches were lighted—how many pairs of lights inside.

A. There's three chandeliers, double lighted.

Q. What kind of lights were they?

A. Coal-oil.

Q. Then, there were six flames or jets in each car?

A. Yes.

Q. They were burning, were they?

A. Yes, sir.

Q. Where were they with reference to the aisle?

A. Right in the center.

Q. I will ask you to state whether or not that would be in line with the rear glass door?

A. Yes, sir.

Q. That was a glass door in the rear of that coach?

A. Yes, sir.

Q. I will ask you to state to the jury what the facts, if Mr. Evans had looked when he was 300 feet away, 200 feet away, in the direction of that train, and had looked at the train, whether he could have seen that light.

A. Yes, sir, he could have seen it very plain, be-

(Testimony of N. P. Scruggs.)

cause you see all three lights on the ceiling, when you are down, and the door is up here—I have tried it many a time—you can see all three lights on the ceiling.

Q. Could he have seen it was a train that was there if he had looked in that direction?

A. Yes, sir, he could have saw that light. He couldn't help but see it.

(Excused.)

N. P. SCRUGGS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FENTON.)

Mr. Scruggs, you were the brakeman on that train on the evening of this accident, were you?

A. Yes, sir.

Q. How old a man are you, Mr. Scruggs?

A. 35 years old.

Q. And where do you live?

A. In Portland.

Q. Are you a man of family or single man?

A. Man of family.

Q. How long had you been in the employ of the Southern Pacific Company, and in what capacity, up to the time of this accident?

A. Well, I had been in about three years, I think, prior to this, in the freight and passenger, brakeman.

(Testimony of N. P. Scruggs.)

Q. How long had you been a passenger brakeman on the Oswego run at the time of the accident?

A. Oh, I probably hadn't been on there more than two or three months, I think, either July or August.

Q. What train did you act on between Oswego and Portland, or Portland and Oswego?

A. Well, that was the Oswego Local, we called it.

Q. It was the same train of which Mr. Keyzer was conductor?

A. Yes, sir, same train on which he was working.

Q. Train No. 51? A. 41.

Q. 41. Now, were you familiar with the track and general situation between Oswego and Wilsonia, at and before this accident and since?

A. Well, I was fairly well. I have not been working there a great while.

Q. Are you working there yet?

A. Well, I am working through there, from Portland to Dallas now, at present.

Q. You are on the through line?

A. Yes, sir.

Q. I will ask you to state to the Jury, now, in your own way, just what occurred when you came into Wilsonia that evening, before this accident, on the evening of September 25, 1909. What was done by you, by the train men, up to and including the accident? Just tell it in your own way.

A. Well, we just pulled up to Wilsonia, as we

(Testimony of N. P. Scruggs.)

always do, and instead of going to Oswego we had to make our switch there, and in doing so we unloaded our passengers, and the conductor got off, and went up to the switch. I got on the rear of the train, and we backed up probably four or five car-lengths; stopped; and I got off; walked up to the front of the cars and uncoupled the hose; and by that time we give him a signal that I was ready. He saw the signal from the conductor. He went ahead. I made the drop, and I rode the front end in the clear.

Q. You rode the front end of what?

A. That was the front end of the train, going to Oswego then. It was the first coach behind the engine. The front end of the first coach.

Q. That would be the front end north?

A. No, the front end south. It would be the front end south. I rode that in the clear.

Q. That was the same end that struck Evans?

A. Yes, sir, same end; and same end we uncoupled the engine from. I stood there with my light and rode that in the clear; and then I pulled the air on it. We have a stop on the train. And I walked back through the coaches, and at that time the conductor had let the engine back through the switch, and he lined it up, and got on the pilot.

Q. What do you mean by lined it up?

A. That is, lining it up for the main line again.

Q. Throwing the switch again?

(Testimony of N. P. Scruggs.)

A. Throwing the switch again for the main line.

Q. Then what became of the engine?

A. Then he rode the pilot up to the rear of the train, and I was there and got out of his way, and he got off the pilot, and got on the steps of the rear end there, and went on through the door.

Q. Now, what did you do after he got on the steps and started through the coaches south?

A. Well, then I got down between the engine and the car to couple up the air, and also the train hose, as we call them.

Q. What did you have to do, now? Just tell the jury the details.

A. There is the hose coupling, there is two at each end. One of them is used for the engineer to stop the train with, and set the brakes, and the other is used for the conductor, and sometimes the brakeman, too, to pull the cord, and that just whistles in the cab, so the engineer can stop. We use them as signals. And I coupled those two together. Then I turned the angle hose—turned the air from the engine into the train.

Q. What I am getting at is, how many manipulations do you have to go through with, with your hands, after the conductor started to go through, before the train was ready to go?

A. Well, I coupled two hose and turned four angles.

(Testimony of N. P. Scruggs.)

Q. About how long would that take you, ordinarily, or did it take you on that evening?

A. Well, I just took my time, because we had plenty of time—we were on time—and there was no occasion for a rush. I just took my time for it. It would not take—I don't know—something like a minute, I guess.

Q. Let me ask you—did or did not the conductor have time enough, during the time that you were doing this coupling, to walk through both coaches and get onto the south end of that coach?

A. Yes, sir, he had plenty of time to do it; and I didn't give him a signal to go ahead the moment I cut the angles in, but I waited until I heard the air released.

Q. What do you mean by that?

A. You see, when I rode the cars through into the clear, then I set the air on those two coaches, and that locked the wheels.

Q. Who would release the air?

A. The engineer, after I cut these hose, then he would release that from the engine. I waited till I heard that released. We have a little retainer, that we can hear whistle through the coach just when it is released. Then I gave the signal to go ahead.

Q. After you gave the signal to go ahead, did the train start?

A. Yes, sir.

Q. Then, what did you do?

(Testimony of N. P. Scruggs.)

A. Then I got up on the platform and took my markers down, which were still on.

Q. Where were these markers?

A. They were on the north end of the train then.

Q. Next to the pilot?

A. Yes, sir, next to the engine.

Q. You reached up to the end of the coach and took down a marker there, and then to the other side and took down another marker?

A. Yes, sir.

Q. What were those markers? What lights?

A. They were ordinary lamp-light, but they were in a green and a red globe.

Q. Were they lighted?

A. They were lighted, both of them.

Q. What were they for?

A. Well, they are to indicate the rear end of the train.

Q. What did you do then, after you took your markers down?

A. Then I started through the train to the other end.

Q. And did you get through to the other end before the signal to stop was given?

A. I got about the middle of the train, that is, between the two cars, when the signal was given, and I was possibly inside just a little ways when the air released.

Q. Of the second coach? A. Yes, sir.

(Testimony of N. P. Scruggs.)

Q. That is of the rear coach?

A. That is the rear coach going towards Oswego.

Q. And when you got in the rear coach, before that signal to stop, I understand—who gave that signal, do you know?

A. No, sir.

Q. That signal to stop?

A. No, sir, I do not know who gave it.

Q. You didn't give it?

A. No, sir.

Q. Was the conductor in the car at that time, or was he out on the platform?

A. No, sir, he was out ahead of me. I had walked the one car, and was on the front platform of the rear car, when that signal was given.

Q. Then what did you do?

A. Well, I still went on through the train. I didn't think anything out of the ordinary, because we sometimes at that time of night had sleepy passengers, that didn't get off at the right station. I didn't think—I just went on about my business.

Q. You didn't know what the call was for?

A. No, sir.

Q. Whether it was to let off somebody that should have got off at Wilsonia, or what?

A. No, sir.

Q. Well, now, when you got in the rear coach, did you see the rear door? Did you notice the rear door?

A. The door towards Oswego?

Q. Yes.

(Testimony of N. P. Scruggs.)

A. Yes, sir. The door towards Oswego was shut.

Q. Where was the conductor at that time?

A. Well, he must have been on the outside of that door, because I had walked through the other car, and he was not there.

Q. Now, was that before the train stopped, and after the signals were given?

A. It was just about the time the signal was given, and I had stepped inside by the time he had applied the brakes.

Q. How far did the car move after the brakes—after the signal was given?

A. I don't believe it moved over half a car after he applied the emergency.

Q. Some of these witnesses testify these cars were 50 or 55 feet long. What is your recollection of that?

A. That is what I was instructed, it was 55 feet long. That is what I was told when I asked.

Q. Now, I will ask you to tell the jury whether you recollect anything about an engine bell on that engine that evening; what kind of a bell it was, and whether it was ringing from the time you got to Wilsonia until you got to Oswego.

A. Well, you know the engine bell is a large—about that size; ordinary engine bell; and it was ringing.

Q. Is it automatic or pull?

(Testimony of N. P. Scruggs.)

A. It has an automatic ringer on it, and it had also the old rope—the cord.

Q. Who manipulates the bell?

A. Well, I am not familiar with that part about it. I know the cord runs clear around on both sides.

Q. It is operated from the cab on the end?

A. Yes, sir, it is operated from the cab.

Q. Did the engine have a head-light on each end?

A. Yes, sir.

Q. What was done with the headlight next to the coach, after you started back?

A. They pulled the blind down over it. It was always down after I made the coupling. They nearly always left it there for me to see.

Q. Were those coaches lighted? A. Yes.

Q. Now, I will ask you if the train made any noise in going south there, going up that little grade?

A. Well, yes. You never saw a train running that didn't make some noise, and especially in starting, like that—always do. There is more or less noise from the engine.

Q. Did you see Mr. Evans before he was struck, or after he was struck?

A. No, after he was struck.

Q. Just where did you go after you found out somebody was hit?

A. I went to them; but before I found that out I proceeded on to the front of the car, and when I got

(Testimony of N. P. Scruggs.)

there I didn't see any one, so then I kind of thought there was something up, so I jumped off on the opposite side of them.

Q. You went to the rear of the car?

A. Yes, sir.

Q. That would be the rear next to Oswego?

A. To Oswego.

Q. You found no one there?

A. No one there; so I set my markers down and jumped off on the west side instead of jumping off on the east side. I didn't know where the trouble was. I jumped off on the west side, and ran the length of two coaches; got up on the rear platform of the second coach, and looked down on the bank before I really knew what happened.

Q. What did you see when you did that?

A. I saw a bunch of men congregated around there.

Q. On the east side of the car?

A. Yes, right down the bank, probably—I don't know just what distance; off a little ways, though.

Q. I don't remember—I don't know—you didn't hear any conversation between Evans and the other train men, did you?

A. No, sir, I did not.

Q. Did you notice any people walking on those tracks between the rails, after nine or ten o'clock at

(Testimony of N. P. Scruggs.)

night, between Oswego and Wilsonia? Did you ever see anybody?

A. I never saw anybody.

Q. During the day-time, have you seen people walking on the track?

A. I have occasionally seen people walking back and forth.

Q. They walk all the way down to Elk Rock?

A. Yes, and I have seen them get off just the same there as they do at Rock Spur, to walk on out to their path that leads out to their home; and at Riverdale, Ewawee, and such places as that.

Q. Do you know where those paths are that lead up the hill from the foundry?

A. No, sir, I am not familiar with those paths.

Cross Examination.

(Questions by Mr. LATOURETTE.)

Did you have any other lantern besides those two markers?

A. I had my lantern besides those two markers, yes, sir.

Q. When you got off the train, did you take your lantern with you? A. Yes, sir.

Q. You walked up on the west side two car-lengths, and then got on and passed over, and then down on the east side? A. Yes, sir.

Q. And then went to this bunch of men?

(Testimony of N. P. Scruggs.)

A. Went near them. I didnt go to them—not right then.

Q. You didn't go to them? A. No, sir.

Q. You didn't go up to them? A. No, sir.

Q. Did you go out to the hospital?

A. I went out there several days later, yes, sir.

Q. To see this young man? A. Yes, sir.

Q. And did you say anything to him about its being his own fault? A. No, sir.

Q. Out there at the hospital?

A. Out at the hospital, I expect that I did. I wouldn't swear what I said out there. I know I visited him, and he commenced telling me something about the train-crew. I don't think he knew who I was at the time. He commenced telling about how abusive the train-crew were, and how negligent they had been, and his father spoke up and said something, and then I said something. I told him I kind of thought it was his own fault. I expect I said that.

Q. And he claimed that it was the fault of the crew?

A. He claimed it was the fault of the crew. After he was out there, he commenced telling me how negligent.

Q. Didn't he ask you, when you came there, Mr. Scruggs, if you were an employee of the company?

A. He never mentioned that.

(Testimony of N. P. Scruggs.)

Mr. FENTON.—How long after the accident was this?

Mr. LATOURETTE.—He said probably a few days.

Mr. FENTON.—I don't see how this would be binding on the defendant.

COURT.—It is not cross-examination.

Mr. LATOURETTE.—It might tend to test the credibility of the witness.

COURT.—I do not see how that affects the credibility of the witness. This is not cross-examination, and if there is objection on that ground, the court would have to sustain it.

Mr. LATOURETTE.—Any statement that he made there, your Honor, as to not being in the employ of the company, do you think that would not be proper?

COURT.—If you want to impeach the witness, you will have to put an impeaching question. This is not proper in this case. You will have to lay the foundation.

Q. did you not, in that conversation with Mr. Evans and his father, there at the hospital, they two being present, at this visit that you speak of a few days after the accident, state that you was not in the employ of the Southern Pacific Company?

A. No. No, that was not mentioned.

Mr. FENTON.—Objected to—just a moment. I

(Testimony of Thomas Evans.)

object to that as immaterial, and as not an impeaching question, one having no relation to the issue, the witness not having testified he was there, or about any conversation with this young man. It is a wholly collateral matter, and wholly irrelevant.

COURT.—I think it is irrelevant.

Mr. LATOURETTE.—All right.

(Excused.)

Mr. FENTON.—We rest, your Honor. That is all our testimony.

Praintiff's Rebuttal

THOMAS EVANS recalled in rebuttal for plaintiff.

Direct Examination.

(Questions by Mr. LATOURETTE.)

Mr. Evans, I will ask you if you ever made the statement to the conductor of this train, or to any one, that it was your own fault, and that you did not blame the train-crew, or anything of that kind?

A. No, sir, I never did.

Q. Was there anything said while you were down there hurt, at the side of that train, on that subject by you?

A. Not by me. I never said a word about it.

Q. Was there by any one, as far as you know?

A. I never heard it, if they did.

(Excused.)

(Testimony of Charles Howard Elston.)

CHARLES HOWARD ELSTON called in rebuttal for the plaintiff.

Direct Examination.

(Questions by Mr. LATOURETTE.)

Mr. Elston, were you the first man that got to Evans when he got hurt up there?

A. Pete Emmett was there just before I was.

Q. Were you there before the conductor came up?

A. I passed the conductor in going down, I think, just before we got to the boy, just a little bit before.

Q. Were you with Evans during all the time he was there, and until after you got him to the hospital?

A. Yes, sir. The only time that I left him was after we got to the Jefferson depot, we took him into the baggage room, and once I walked out to see if the ambulance had arrived there, and right back. I was with him every instant except that time.

Q. I will ask you if you heard Evans, at any time when he was there on the grass near the train, shortly after he was hurt, or at any time, say that it was his own fault?

A. I did not.

Q. Or that he didn't blame the train men?

A. No, sir.

Q. Or anything of that kind? A. No, sir.

Q. Would you have been pretty apt to have heard it if he had made any statement of that kind?

A. Well, now, I will tell you—it is just like this: from the moment I got to the boy and saw the condi-

(Testimony of Charles Howard Elston.)

tion he was in, I paid very little attention to any conversation. I was thinking of helping the boy, assisting him, and getting the blood stopped and keeping it stopped until we got to the hospital, so if there was any such conversation I never heard a thing of it.

Q. You were right by his side all the time, were you?
A. Yes, sir.

Q. And you were the one that bound up the limb?

A. Yes, sir.

Q. What condition of mind was he in with regard to being in pain or agony, or anything of that sort?

A. Well, sir, I don't believe the boy was responsible for what he said, for this reason—

Mr. FENTON.—I move to strike that out, if your Honor please, as calling for an opinion of the witness.

Mr. LATOURETTE.—That is his way of putting it. I expect I can put it in different language.

Q. What was his condition of mind and his actions owing to the injury that he had received?

Objected to, as incompetent.

COURT.—I think you may ask whether the boy was in pain and suffering or not. I don't think Mr. Elston could give an opinion on the subject.

Q. Was it evident that the boy was in pain and suffering there during all that time?

A. Yes, sir, it was very plain.

Q. State whether he appeared to relapse into a condition of faintness?

(Testimony of Peter James Emmett.)

A. He did, yes. After we got him on the car, and I was talking to him, and trying to find out who his relatives were, in order to notify them, well, he would be talking along, and he would close his eyes and kind of settle back. He had lots of nerve, and he had his hands kind of under his head, and at times would kind of raise his head up; and I was talking to him, and trying to find out who his folks were; he would close his eyes and settle back like that. I had sent for a bottle of whiskey just as soon as I got the limb bound up, and I would give him a little bit of the whiskey. That would revive him up, and then he would go ahead and talk.

Q. You stayed with him until he got to the hospital?
A. Yes, sir.

Q. Now, you are not related in any way, and have no interest in this case one way or the other?

A. Not whatever, none in the least.

Mr. FENTON.—We don't question Mr. Elston's standing or his credibility. No questions, Mr. Elston.

(Excused.)

PETER JAMES EMMETT recalled in rebuttal for the plaintiff.

Direct Examination.

(Questions by Mr. LATOURETTE.)

Mr. Emmett, you have been sworn. Now, who was the first person that got up to Evans' side after he was hurt?

(Testimony of Charles Howard Elston.)

A. I was the first one, and Mr. Elston was next.

Q. Who was next?

A. I don't know who was next.

Q. Well, do you know the conductor?

A. Yes, sir.

Q. You and Elston were both there before the conductor? A. Before anybody.

Q. Did you see the engineer come up?

A. Yes, sir.

Q. Now, up to the time the engineer came up there, were you right by the side of Evans all the time? A. Yes, sir.

Q. Now, did you hear him say anything about it being his own damn fault?

A. I never noticed it, no, sir.

Mr. FENTON.—How is that?

A. I never noticed him say anything of the kind.

Q. Or about not blaming the train-crew?

A. No, sir.

Q. You never heard anything of that?

A. Never heard nothing.

(Excused.)

CHARLES HOWARD ELSTON recalled for the plaintiff.

Direct Examination.

(Questions by Mr. HAYS.)

I think you swore, Mr. Elston, that you were familiar with the grounds there at the time of the accident? A. Yes, sir.

(Testimony of Charles Howard Elston.)

Q. Well, now, I will ask you to state to the court and jury whether or no, at the point where young Evans and Emmett are supposed to have gone on the railroad track—what was the condition on the westerly side of the track with reference to a bank being there, if you know?

A. There was an embankment from the point where I am told that they came onto the track—of course, I was not there; I could not say where they came on; but from the point that they are supposed to have come onto the track to the point where he was hurt, there is an embankment there on the west side, was at that time, fully 15 feet high at the highest point.

Q. How far did it extend toward Portland or Wilsonia?

A. Well, that cut ran around there, it must be 250 feet.

COURT.—I don't think that affects this case, as to the height of that embankment on the west side of the track.

Mr. HAYS.—Well, I cannot see that it materially affects it myself, any more than it would be impossible for them to get over the bank; that he could not cross over and go in a westerly direction at that point.

COURT.—I suppose it is not denied but what there was a bank along the west side at the time.

Mr. HAYS.—No, I think not.

(Testimony of Charles Howard Elston.)

COURT.—The height of that bank makes no difference.

Mr. HAYS.—The only reason I thought it would be well to prove that, your Honor, was that, when the question of fact goes to the jury, counsel could not argue that the plaintiff could have crossed over the track and gone down on the other side.

COURT.—Well, you may ask that question. I don't see the relevancy of it.

Q. How far down did that bank extend, north?

A. That bank extended, it must have been—well, it is the length of that cut. I couldn't say—around 250 feet—somewheres along there.

Q. Down to a point near where Evans was hurt?

A. Near where he was hurt. It was the length of the cut. As I understand, he came onto the track at the south end of this cut, and where we found him lying was just at the north end, that is, of the bank on the east side of the old railroad.

COURT.—You mean the west side?

A. The east side; the end of the bank on the east side. On the west side there is an embankment clear along, I think, to Wilsonia.

Q. Was there another track still west of that?

A. They were cutting out for that other track, and from Wilsonia south they had the track there. I could not say just how far, but at least they had it far enough, in making their flying switch that night they

(Testimony of Charles Howard Elston.)

ran their engine back on the new line and dropped their coaches back on the old line.

Q. How wide was that embankment on the west side you have just described to the jury? How far west would it extend?

A. How far west from the old track?

Q. Yes.

A. From where the train stood after they made the flying switch?

Q. No, how far from where the boys came on the track? How wide was it from one end to the other?

A. From where the boy was lying to the west side?

Q. No, the entire distance, approximately, how far was it over to the other track, to the westerly track?

A. Well, there was no track opposite where the boy was lying—I don't think there was any track there at that time. The cut was made.

Q. The track has been built since?

A. The rails were laid in there after this accident; but they had laid the track far enough up from Wilsonia in order to run the engine back in there when they made that flying switch.

Q. There was a cut in there, was there?

A. Yes, sir.

Q. How wide was that embankment from the track upon which the boy was hurt—how wide was

(Testimony of Charles Howard Elston.)

the embankment from the cut over to the westerly side towards the county road?

A. It was just wide enough on the old line for the road-bed.

Q. I mean the width of the embankment, not the road.

A. The embankment between the two cuts?

Q. Yes.

A. Oh, I understand. Well, I should judge the base of that was in the neighborhood of 30 feet—somethink like that. I couldn't say, right at this point where the boy was lying, I couldn't say as to the width of the embankment along there.

Cross Examination.

(Questions by Mr. FENTON.)

When you say embankment, Mr. Elston, do you mean the space where the tracks were, between the two banks on either side of the tracks? Do you mean the grade?

A. I mean the embankment between the two railroad cuts. Of course, what I meant, and what I testified to was this.

Q. Between the old track and the new track?

A. Yes. But there was no new track there at that time, I don't think.

Q. Well, now the space that had an embankment there, as you say, how wide apart at the base was

(Testimony of Charles N. Haines.)

that? Just a big chunk of earth there between the two tracks?

A. Yes. But just how wide it was, I couldn't say, as to the point where the boy was lying there. But the widest place between the point where he struck the railroad track and the point where we found him must have been about thirty feet.

Q. That is the embankment between the two tracks? A. Yes, sir.

Q. Well, now then, something has been said here about the point where the man entered on the right of way from this path, and about the embankment being 15 feet right on west there across. If people wanted to travel that path, and wanted to go towards Oswego, they could go diagonally across and up the hill, couldn't they?

A. I believe so. But I am not well acquainted with just how that trail ran across there. I couldn't say exactly.

(Excused.)

CHARLES N. HAINES recalled in rebuttal for plaintiff.

Direct Examination.

(Questions by Mr. HAYS.)

State to the court and jury whether or not there is an embankment on the westerly side of the track where the boy was hurt, and if so, how far down does it extend toward Wilsonia?

(Testimony of Charles N. Haines.)

A. Whether there is a bank there now or not?

Q. Yes, at the time he was hurt, was there a bank there, where they came onto the track?

A. Yes, sir.

Q. How high was it?

A. Well, I should judge the highest place, it was about 15 feet, at the very least calculation.

Q. How high in the lowest?

A. I know I sat up on the bank many a time, and you have to look down to look at the top of the train as it went by—the coaches.

Q. Was it so all the way down to where the boy was hurt? A. Yes, sir.

Q. How high was it down about where the boy was hurt?

A. Well, it was pretty much the same height down there, too, at the north end of the cut. The south end was not quite so deep.

Q. There was a road-bed dug out on the other side, wasn't there, on the westerly side, toward the county road? A. Yes, sir.

Q. Now, about, approximately, what would you say was the width of that bank of earth that was in there?

A. Between the new road-bed and the old one?

Q. Yes, on the left—on the westerly side.

A. About 35 or 37 feet—somewhere along there.

Q. What was the width of the road-bed going

(Testimony of Charles N. Haines.)

through that cut? Approximately, as near as you can state to the jury? A. The old cut?

Q. Yes, the old track, where the boy was hurt, and where he came onto the track where he was hurt.

A. Well, I judge it was about—I don't know just how much—probably eight or nine feet. I know in the old cut, when you go through, if you would happen to meet a train, you would have to lay back against the bank to keep the steps from hitting you.

Cross Examination.

(Questions by Mr. FENTON.)

Pretty dangerous place, then, for a man to go night-time—10:40 at night?

A. Yes, sir, it would be dangerous for a man to get there in the night-time, in the dark.

Q. About 250 feet long, that cut was, wasn't it?

A. I think so.

Q. Only about the width of the ties where the track was?

A. There was only about a foot on each side at the bottom of the bank. Of course, it sloped up.

Q. A man undertaking to go down through that, if a train was coming, would have little chance to escape?

A. The only way he could do was to lay back against the bank to keep from getting hit.

Redirect Examination.

(By Mr. LATOURETTE.)

(Testimony of Charles N. Haines.)

Q. Plenty of room on the other side to get away from the train? A. Which side is that?

Q. On the east side?

A. At the end of the cut there was room to get away.

Q. At the end of the cut?

A. At the end of the cut, yes.

Q. Both ends of the cut, wasn't there?

A. Both ends of the cut, yes; but not right in the cut.

(Excused.)

Plaintiff rests. Defendant rests.

Motion for a Verdict for the Defendant, etc.

The foregoing is all the testimony introduced by both parties on the trial and all the testimony in the case.

Whereupon defendant moved as follows:

Mr. FENTON.—If the Court please, I desire to move at this time for a directed verdict in favor of the defendant, upon the ground that the plaintiff has not proven any evidence, or sufficient evidence to go to the jury; and upon the further ground that the proof shows that the plaintiff, at the time of this accident, was a trespasser, where he had no right to be, and that the company owed no duty to him excepting not to willfully or wantonly injure him after it discovered his position of peril; and upon the further ground that the proof shows, I think beyond any sort

of doubt, that the plaintiff was himself guilty of negligence, which caused the accident.

Whereupon the Court ruled and instructed the Jury as follows, after argument by counsel for both parties:

COURT.—There are two questions involved in this case particularly at this time. One is the question whether the railroad company owed a duty to the plaintiff as to the manner of running its cars at that point; and the other questions is, What effect would the acts of the plaintiff have as contributing to his own injury?

The defendant had for sometime been running its cars between Wilsonia and Oswego, and upon the west of the line there was a townsite laid out, and some people who lived over there on the west side of the track. On the other side of the track there is the Oswego Iron Works. And people were accustomed to cross this track in going to the iron works, and in going back to the west side of the track, where they had their homes. The testimony shows there were three or four crossings, going to Wilsonia from Oswego. There was one right at Wilsonia. That road came into Wilsonia from the Iron Works, or from this farm that has been described. And there is testimony which tends to show that the track itself from Oswego down to Wilsonia, and from intermediate points to Wilsonia, had been used more or less by pedestrians—people who had occasion to pass be-

tween the two places. It is quite evident that school children went upon the track at Wilsonia, going towards Oswego, and used the track in the daytime. There is very little evidence in the case which goes to show that this track, inside of the rails, was used at night by any considerable number of people. Some people had gone up and down. Mr. Fox has testified he went up and down that track at night—10 o'clock—along about the time when this accident happened, and even after that. I say there is some evidence tending to show that. I am impressed that there is evidence which is sufficient to carry this case to the jury upon the question whether or not these parties, living in and about the town, who had their work to do over at the Oswego Iron Works, were not licensees by implication, and whether or not they had sufficient rights there as licensees to require the company to observe ordinary care in running its trains between those stations, for the protection of those people. That is a question, as to the amount of care, which the jury would have to determine for itself. I think there is enough to carry the case to the jury upon that point.

But the most direct point in the case is the question whether the plaintiff himself has not so acted as to preclude him from recovery. He testifies that he saw the train at Wilsonia about the time he left the barn, or shortly thereafter. I don't fix the exact place where he saw the train at Wilsonia. And then he saw

it again about the time he was ready to enter the track. He knew the train was there. And Mr. Emmett testified to the same thing. He probably does not testify to seeing the train down at the barn, but when he got up to the track he saw the train, and he knew the train was there. And furthermore they saw that the train was headed towards Portland. They believed, as they say, the train was standing still, but they entered upon the track without looking further, without making further investigation as to the special condition of the train, whether it was moving or standing still, and as to the way in which it was going. After entering upon the track, they passed over a space of ground about 300 feet—between 200 and 300 feet—and were walking very rapidly, and perhaps running. At least, they were walking rapidly, and they would pass over that space on the ground in less than half a minute's time, but they had that time in which to determine for themselves the condition of the train. It seems very plain to my mind that, if the boys had stopped as they came to the track, and then made an investigation for themselves as to the condition of that train, they would have found it out—they could have ascertained very clearly. But instead of doing that, they entered at once upon the track, and began going towards the train, believing, as they say, that the train was standing still. At that distance, there is no question that the train was making such a noise by the exhaust

from the engine in starting up, that the boys could have heard it and known it was there. But instead of their taking the precaution to learn as to the condition of the train, as to its movements, they were in a very great hurry, and passed on the track and hurried towards the train, being in the middle of the track themselves. The plaintiff says that he did not see the train until he was struck, or just about the time he was struck. He was struck and thrown down, and the car passed over him. Emmett, who was with him, saw the train about the time that the plaintiff was struck, and was enabled to get out of the way. If the plaintiff had been paying as much attention to the movement of the train as Emmett, it is very clear that he could have gotten out of the way also. Upon the whole, it appears to me that, if there is any fault in this case, it is the fault of the plaintiff himself, and not the fault of the defendant. These boys, if they had exercised ordinary care in their approach to the track and their entrance upon the track, and their approach to the train, there is little doubt but what they could have ascertained the movement of the train, and thereby have avoided collision with the train. I think this case will have to be taken from the jury because of that fact.

And I come all the more satisfactorily to this decision because of the testimony that has been developed by the defendant in showing that it did exercise very great care in the movement of that train at that

point, and that there was not negligence in the movement of the train upon the part of the defendant that would render it liable. But of course if the case went to the jury, that would be a matter for the jury to determine. But as to the negligence of the plaintiff himself, I think there is enough in this case. I think it so stands upon the evidence that there could no two opinions about it, and that being so, it is the duty of the court to determine the cause, and direct a verdict for the defendant.

Mr. FENTON.—While your Honor was announcing the decision, I have prepared a form of directed verdict for the defendant.

COURT.—Now, Gentlemen of the Jury, it becomes my duty in this case, under the facts as disclosed at the trial, to instruct you to render a verdict for the defendant. You have heard the reasons of the court therefor, and for those reasons I direct you to find a verdict for the defendant. To which the plaintiff duly excepted.

The foregoing matters as they do not appear upon the record in this cause, are hereby incorporated by the plaintiff into this Bill of Exceptions, which is settled and signed this 20th day of July, A. D., 1911.

CHAS. E. WOLVERTON,

Judge.

Filed July 20, 1911. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 29th day of July, 1911, there was duly Filed in said Court, a Petition for Writ of Error, in words and figures as follows, to-wit:

Petition for Writ of Error.

In the Circuit Court of the United States for the District of Oregon.

THOMAS EVANS,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Your petitioner, Thomas Evans, complainant in the above entitled cause, brings this, his petition for a writ of error, to the Circuit Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 19th day of December, 1910, there was entered herein, a judgment against your petitioner, in favor of the Southern Pacific Company.

That your petitioner is advised by counsel that there are manifest errors in the records and proceedings had in said cause in the rendition of said judgment, to the damage of your petitioner, all of which errors will be made to appear by an examination of the said record, and more particularly by an examination of the bill of exceptions, by your petitioner tendered and filed herein, and in the assignment of errors thereon hereinafter set out, and to the

end that said judgment and proceedings may be reversed by the United States Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a writ of error may be issued directed therefrom to said Circuit Court of the United States of Oregon, returnable according to law and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignments of error, and all proceedings had in said case that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the error if any, has happened, may be fully corrected, and full and speedy justice done your petitioner.

And your petitioner now makes the assignments of error attached hereto, upon which he will rely, and which will be made to appear by the return of the said record in obedience to said writ.

Wherefore, your petitioner prays the issuance of the writ as hereinbefore prayed for, and prays that his assignments of error annexed hereto may be considered as his assignments of error upon the writ, and that the judgment rendered in this case may be reversed and held for naught and said case be remanded for further proceedings.

Signed,

C. D. & D. C. LATOURETTE,

J. M. GEARIN,

G. E. HAYES,

LATOURETTE & LATOURETTE,

Attorneys for Complainant.

Filed July 29, 1911. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 29th day of July, 1911, there was duly Filed in said Court, an Assignment of Errors, in words and figures as follows, to-wit:

Assignment of Errors.

In the Circuit Court of the United States for the District of Oregon.

THOMAS J. EVANS,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Comes now the complainant in the above entitled cause (and plaintiff in error in a petition for a writ of error in said cause) and makes the following assignment of errors which he avers occurred upon the trial of said cause, and which are asserted and intended to be urged by him in the prosecution of said writ of error in the Circuit Court of Appeals of the United States for the Ninth Circuit, to-wit:

I.

The Court erred in granting and allowing defendant's motion for a directed verdict.

II.

The Court erred in directing the jury to return a verdict for the defendant.

III.

The Court erred in granting defendant judgment for costs and in dismissing plaintiff's action.

C. D. & D. C. LATOURETTE,

JOHN M. GEARIN,

G. E. HAYES,

LATOURETTE & LATOURETTE,

Attorneys for Petitioner.

Filed July 29, 1911. G. H. Marsh, Clerk.

And afterwards, to-wit, on Saturday, the 29th day of July, 1911, the same being the 94th Judicial day of the Regular April, 1911, Term of said Court; Present: the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Allowing Writ of Error.

In the Circuit Court of the United States for the District of Oregon.

THOMAS J. EVANS,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Upon motion of the attorneys for the complainant and upon filing a petition for writ of error and an assignment of errors:

It is ordered that a writ of error be, and hereby is,

allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at \$500.00.

Dated July 29th, 1911.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to-wit, on the 4th day of August, 1911, there was duly filed in said Court, a Bond on Writ of Error, in words and figures as follows, to-wit:

Bond on Writ of Error

*In the Circuit Court of the United States for the
District of Oregon.*

THOMAS J. EVANS,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Know all men by these presents: That we, Thomas J. Evans, as principal, and R. D. Wilson and F. J. Meyer as sureties, are held and firmly bound unto the Southern Pacific Company in the sum of \$500.00, to be paid to it, and for the payment of which to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of August, 1911.

Whereas, the above named plaintiff in error seeks to prosecute a writ of error in the Circuit Court of Appeals of the United States for the Ninth District, to reverse the judgment rendered in the above entitled action by the Circuit Court of the District of Oregon of the United States:

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect, and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and effect.

THOMAS J. EVANS, (SEAL)

R. D. WILSON, (SEAL)

F. J. MEYER, (SEAL)

Examined and Approved August 2, 1911.

CHAS. E. WOLVERTON,

Judge.

State of Oregon,
County of Multnomah,—ss.

R. D. Wilson and F. J. Meyer, whose names are subscribed as surety to the foregoing bond, being severally and duly sworn, each for himself, says: That he is a resident and free holder of the State of Oregon, and is worth more than the sum in said bond specified as the penalty thereof, over and above all

his just debts and liabilities, in property not by law exempt from execution in this State.

R. D. WILSON,
F. J. MEYER.

Subscribed and sworn to before me this 1st day of August, 1911.

[Seal]

C. D. LATOURETTE,
Notary Public for Oregon.

Filed August 4, 1911. G. H. Marsh, Clerk.

*In the Circuit Court of the United States for the
District of Oregon.*

THOMAS J. EVANS,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

It is hereby stipulated by the attorneys for the respective parties hereto that the plaintiff in Error be allowed until October 15, 1911, in which to file his transcript of the record in the above entitled matter.

C. D & D. C. LATOURETTE,
JOHN M. GEARIN,
Attorneys for Plaintiff in Error.

Wm. D. FENTON,
BEN C. DEY,
Attorneys for Defendant in Error.

Filed August 14, 1911. G. H. Marsh, Clerk.

*In the Circuit Court of the United States for the
District of Oregon.*

THOMAS J. EVANS,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

Whereas it has been stipulated by the parties hereto that the plaintiff in error may have to October 15, 1911, in which to file his transcript of record in this cause.

Now therefore, upon motion of the plaintiff in Error it is hereby ordered that he have until October 15, 1911, in which to file his transcript of record in this cause, in the United States Circuit Court of Appeals for the Ninth District.

Dated August 14, 1911.

CHAS. E. WOLVERTON,

Judge.

And afterwards, to-wit, on the 3rd day of October, 1911, there was duly Filed in said Court, a Stipulation as to Omission from Transcript and for Order Extending Time to File Transcript, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

THOMAS J. EVANS,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

It is hereby stipulated and agreed by the parties hereto that the above entitled case was duly commenced in the Circuit Court of the State of Oregon for the County of Clackamas; and thereafter was duly and regularly removed to the Circuit Court of the United States for the District of Oregon; it is further agreed that all the proceedings pertaining to the removal of said cause may be omitted from the transcript, with the exception of the complaint, it being understood that all the proceedings pertaining to said removal were regularly and properly taken, and that said Circuit Court of the United States regularly obtained jurisdiction of said action.

It is further agreed that the plaintiff in Error may

have to January 1, 1912, in which to file his transcript herein.

Dated September 29, 1911.

C. D. & D. C. LATOURETTE,

JOHN M. GEARIN,

Attorneys for Plaintiff in Error.

WM. D. FENTON,

BEN C. DEY,

Attorneys for Defendant in Error.

Filed October 3, 1911.

G. H. Marsh, Clerk.

*In the Circuit Court of the United States for the
District of Oregon.*

THOMAS EVANS,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

It having been stipulated by the attorneys for both parties herein that the plaintiff in error may have until January 1, 1912, in which to file his transcript with the Clerk of the Circuit Court of Appeals,—

It is therefore ordered, that plaintiff in error be and hereby is allowed until January 1, 1912, in which to file with the Clerk of the Circuit Court of Appeals for the Ninth Circuit his Transcript of Record.

Dated October 3, 1911.

R. S. BEAN,

Judge.

[Stipulation Concerning Transcript of Record.]

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2091.

THOMAS EVANS,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

It is hereby stipulated and agreed by both parties in the above-entitled action that the foregoing pages, numbered 1 to 381, inclusive, contain a true and complete transcript of the record and proceedings had in the Circuit Court of the United States for the District of Oregon in the case of Thomas Evans, plaintiff, vs. Southern Pacific Company, defendants, with the exception of a part of the proceedings on the removal of said cause from the Circuit Court of the State of Oregon for the County of Clackamas, which removal proceedings being unnecessary for the purpose of this appeal are omitted by stipulation heretofore entered into by the parties hereto.

Signed this December 21, 1911.

C. D. & D. C. LATOURETTE,

G. L. HAYES,

JOHN M. GEARIN,

J. R. LATOURETTE,

Attorneys for Thomas Evans, Plaintiff in Error.

WM. D. FENTON,

BEN C. DEY,

Attorneys for Southern Pacific Co., Defendant in
Error.

No. 2091

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

THOMAS EVANS

Plaintiff in Error

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error

Brief of Plaintiff In Error

UPON WRIT OF ERROR TO THE UNITED
STATES CIRCUIT COURT FOR THE
DISTRICT OF OREGON

JOHN M. GEARIN, G. E. HAYES and
LATOURETTE & LATOURETTE,

Attorneys for Plaintiff in Error

W. D. FENTON and BEN C. DEY,

Attorneys for Defendant in Error

FILED

Press of Oregon City Enterprise.

JUL 5 - 1912.



No. _____

*United States Circuit Court of Appeals for the Ninth
Circuit*

THOMAS EVANS,

Plaintiff in Error.

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

STATEMENT

This is an appeal from the judgment of the United States Circuit Court for the District of Oregon, Ninth Circuit, directing a verdict for the Defendant. The action was brought by Thomas Evans to recover damages for the loss of his leg, caused by the negligence of the Defendant in backing its train against Plaintiff on a dark night without lights, signals or warning.

The evidence shows that Defendant on the 25th of September, 1909, was operating a steam railway between Portland and Oswego, Oregon, a distance of about nine miles. The train which caused the accident complained of in the Complaint was a local consisting of an engine, tender and two coaches, run upon a regular schedule between Portland and Oswego and way points.

It had long been the custom of those managing the

train, in the management and operation of it, to proceed to Oswego, discharge its passengers and perform its switching operations beyond Oswego, so as to be ready to make the return trip. And this custom had become well established and of common knowledge.

The Plaintiff on the afternoon of September 25, 1909, purchased a round trip ticket from Portland to Oswego, on which ticket he rode from Portland to Oswego arriving there at about 4:30 o'clock P. M. Having spent the evening he started with a companion named Emmett, a witness in the case, to catch the 10:45 train at Oswego, the last train for Portland that night. In approaching the station Plaintiff and Emmett were obliged to take a path which crossed the railroad right-of-way between the station at Oswego and the station called Wilsonia—the latter being about 1300 feet Northerly from Oswego and between Oswego and Portland. While proceeding along this path Plaintiff saw by the side lights of the train that he was endeavoring to take that the train was at Wilsonia, headed for Portland and apparently had left Oswego for Portland. Having no watch and knowing that it was the custom to run this train to Oswego, discharge its passengers, run beyond Oswego and return through Oswego to Wilsonia and assuming that this had been done in the manner in which it was customary to do it, Plaintiff concluded that the train had already left Oswego and was at Wilsonia on its way to Portland. Upon reaching the right-of-way

Plaintiff and Emmett proceeded down the track towards Wilsonia, where the train was being headed for Portland with the engine at the Northerly end of the train. There was nothing to indicate to Plaintiff that the train was about to back up towards Oswego, or would back up towards Oswego, or that anything outside the usual manner of handling the train would occur. While Plaintiff and his companion were hurrying down the track to overtake the train before it left Wilsonia, the Plaintiff was struck by the rear coach of the train which instead of being on its way to Portland was being backed South towards Oswego.

The Defendant Company had caused no bell to be rung announcing the movement of the train and no lights were exhibited at the rear end of the train to warn anyone on the track of the approach of the train and no watchman or other person was stationed at the rear end of the train or anywhere to give such notice. This was the first time that the train had been so operated; while before that time, as above stated, it was the practice of the Company to do its switching beyond Oswego. They had just installed a switch at Wilsonia and on this night for the first time they performed their switching operations at Wilsonia before reaching Oswego. After making a flying switch, the engine being then on the Northerly or Portland end of the train proceeded to push the coaches towards Oswego to deliver the passengers. It was while the train was so proceeding and under the

circumstances above detailed that the accident occurred.

QUESTIONS INVOLVED.

Plaintiff charges defendant with negligently and carelessly backing its train on a dark night without the usual or any lights or signal on the end of the train or without ringing the bell or sounding the whistle, and without giving plaintiff any warning or notice of its approach. After all the evidence was in on behalf of both parties the court directed a verdict in favor of the defendant from which the writ of error is taken.

During the trial of the case three questions arose:

FIRST: What right did plaintiff have on defendant's right-of-way—was he an invitee by implication or was he a mere trespasser?

SECONDLY: Was defendant negligent?

THIRDLY: Was plaintiff guilty of contributory negligence?

Upon the first two questions the trial court held that there was sufficient evidence to go to the jury; but upon the third question the court held that the evidence showed contributory negligence and was such that a verdict should be directed in favor of defendant.

The error upon which this Writ of Error is sued out—consists in the Court's finding Plaintiff guilty of contributory negligence, and in directing the jury to find a verdict for defendant.

PLAINTIFF—AN INVITEE NOT A TRESPASSER

The railroad right-of-way between Oswego and Wilsonia is unfenced, there are no cattle guards or tresspass notices; within that distance of 1300 feet there are four distinct paths crossing the tracks; on the easterly side of the track is an iron foundry employing between 50 and 75 men; on the westerly side is the new town of Oswego. The residents around Wilsonia and Oswego and the public generally have used the railroad track between Oswego and Wilsonia for a great many years, both in passing along and going across, with the knowledge and consent of the railroad company; all of which may be understood from the following testimony:

(TESTIMONY OF ROY FOX, a resident of Oswego for 20 years). Transcript 171-173):

Q. To what extent has the railroad track and right-of-way between Wilsonia and Oswego been used by the public as means of travel—roadway?

A. Well, about 90 out of 100 will travel the railroad. Very seldom see one travel the wagon road.

Q. That is foot passengers or pedestrians?

A. Yes, foot passengers.

Q. What is the condition of the track in between the rails as to being smooth and passable or not?

A. Well I have always found it a pretty good foot path day or night.

Q. Is it ballasted with gravel?

(Testimony of Roy Fox.)

A. No, sir, it is ballasted with dirt. There is some rock in it; once in a while would be a rock that would stick up out of the dirt. There is a beaten path.

Q. How far back has the track been in that condition to your knowledge?

A. As long as I can remember.

Q. What class of people travel over that track from Wilsonia to Oswego on the railroad right-of-way?

A. Everybody. There aint no class at all—the public generally travel it.

Q. Is there any sidewalk between the two towns—the two stations?

A. Between where?

Q. Between Wilsonia and Oswego.

A. No, sir.

Q. There is a county road upon the hill?

A. There is a county road, yes.

Q. But there is no sidewalk?

A. No sidewalk.

Q. Have you seen people traveling night and day?

A. Yes, sir.

Q. All times of the night and day?

A. Yes, sir, I have traveled it myself.

Q. Sir?

A. I say I have traveled it myself that way.

Q. Do you know whether or not the railroad company and the agents there knew of this travel?

(Testimony of James Headrick.)

A. Yes sir, I have met section foremen and I have met bridge carpenters' foreman and I have met the agent, and talked to all of them right on the track—Held conversation with them.

Q. Never seen any saddle guards or trespass notices?

A. Never have since I can remember anything about it.

TESTIMONY OF JAMES HEADRICK, a resident of Oswego for 18 years (Transcript 201-204.):

Q. To what extent do they use the right-of-way as a means of travel between the two points?

A. Well people generally use it because I suppose that the county road—it was like myself—they would sooner travel the railroad than the county road. It was more convenient for me and suppose they had the same idea.

Q. Has that always during all that time been the better walk?

A. Yes sir.

Q. Has there been a well beaten and well defined pathway between the rails.

A. It has been a leveler road. The other was quite a hill to climb over, and then we generally had it six or seven months of the year pretty muddy. And again it was a little bit nearer from Wilsonia to the other station. Just took the railroad track, at least I did.

(Testimony of James Headrick.)

Q. In what respect was it preferable to the county road?

A. Well it was leveler and no mud; it was a cleaner and decenter walk.

Q. What class of people have you seen using the right-of-way for travel?

A. Well, I saw most all classes—laboring men and business men and all classes travel the road.—

Q. How many paths were there between Wilsonia and Oswego station?

A. There were about four regular paths.

Mr. FENTON—That is that crossed the track, you mean?

A. Yes, sir, about four paths.

Q. So that you have observed people going up and down the track, and also crossing the track, every direction?

A. Oh, yes, yes; I have seen them going.

Q. During all this time did you ever see any school children going along the track there between Wilsonia?

A. Yes, Sir. Mine have traveled it. I lived four years down there. That is, I didn't live there four years—I lived about a year and a half, my family did, down on that bottom of the new bridge.

Q. When was that?

A. It is two years ago—three years ago, we went on there.

(Testimony of James Headrick.)

Q. How many children did you have there?

A. Four.

Q. Going to school?

A. Yes, sir.

Q. And what proportion of that year and a half did they travel this track to school?

A. Well, about nine months of the year.

Q. Every day?

A. Nine months school and they went every day of school.

Q. Every day?

A. Pretty much every day.

Q. Was that their usual customary way of going to school?

A. Well, I think so, yes; that is; from Wilsonia. The other road was muddy, and they took the railroad track for it, just like myself.

Q. Was there any knowledge on the part of the railroad company of the use there by the public? Do you know whether the railroad men knew that the public was using that track for travel there?

A. Well, yes, they must have known it. I have talked to them on the road myself.

Q. Who?

A. Why the railroad officials, some of them. The agent there at Oswego, he knew it. I have been there with him when he would be down looking at the cars and such things as that, down near Wilsonia there.

(Testimony of Thomas Fox.)

Q. Has there been any protest or objection against that use?

A. I never heard none.

Q. Ever any cattle-guards or trespass notices up?

A. No sir.

Q. Has the track ever been fenced?

A. No, sir.

TESTIMONY OF THOMAS FOX, resident of Oswego for 20 years (Transcript 139.):

While I lived down there, me and my family and the general public that was afoot traveled the railroad track. I would say, anyhow, pretty near 90 per cent of them would travel the railroad track. I always did myself, and my family. The children went to school. We traveled the railroad track, excepting going across the trestle. We didn't allow our children to go across the trestle if we knew it, but they would cross the bridge, and come back on the railroad, and go from Wilsonia up to the schoolhouse, on the railroad track.

TESTIMONY OF J. T. HARBIN, a resident of Oswego and a blacksmith. (Transcript 186-188.):

Q. Are you familiar with the Southern Pacific right-of-way between Wilsonia and Oswego?

A. Fairly, Yes, sir.

Q. How long have you been familiar with that?

A. About three of four years.

(Testimony of J. T. Harbin.)

Q. To what extent has the public used that right-of-way as a thoroughfare for travel?

A. Do you mean from my place to Oswego?

Q. No, from Wilsonia to Oswego.—The railroad right-of-way?

A. Well they used that—well as a general thing they used it for thoroughfare, that is the public walking. I use it twice a day, as a general thing, myself.

Q. You what?

A. I usually use it about twice a day.

Q. What condition was the walk in between the rails from Wilsonia on south?

A. Well, it was just fair walking. There was nothing extra, nor it was not very bad; it would just be fair walking.

Q. Well, was it the best walk there was between Wilsonia and Oswego.

A. In the winter time it was, yes. More convenient because the wagon road was a hill they had to climb, and we generally avoided the hill as much as possible.

Q. Have you seen other people using it?

A. O, yes, frequently—

Q. Do you know about children going to school that way?

A. My children all went that way.

TESTIMONY OF CHARLES N. HAINES, resident of Oswego since 1881. (Transcript 159.):

(Testimony of Charles N. Haines.)

Q. Are you familiar with the railroad track of the Southern Pacific Company from Oswego to Wilsonia?

A. Yes, sir——

Q. To what extent do the people use that as a thoroughfare, if you know.

A. People use it as a thoroughfare in preference to the county road. They use it as a general thoroughfare, pretty near. I see people there. I have seen them get off the train, and going down that way towards Wilsonia. Instead of going out on the road, they will take the railroad track nearly every time, in preference to walking the county road.

TESTIMONY OF J. M. COON.—*DEFENDANT'S OWN WITNESS*. Transcript 313.):

Q. I will ask you to state to the jury what the fact is if you know about whether or not there was any travel after ten o'clock at night between Oswego and towards Elkrock, down where Wilsonia now is, between the rails—using that as a footpath?

A. Well, I never was there after ten o'clock at night and couldn't say; that is, I don't think I ever was there that late in the evening.

Q. Well, after dark was that track used as a foot path by the people lengthways?

A. Well, I don't know. I think it was used to a certain extent. I know it was used in the day time and I think people that lived down that way went up

(Testimony of J. M. Coon.)

and down the track after night as well as daytime, to keep out of the mud in the winter time and out of the dust in the summer time.

Gardner et al. v. Trumbull 94 Fed. 321: A child while upon the track of defendant, was run over by defendant's train. There was evidence tending to show that the track at that place and for a considerable distance in either direction therefrom, had been used for a long time by the people and villagers who lived in considerable numbers along the right-of-way and on both sides thereof, as a footpath for the purpose of going to and from the city of Trinidad, and to and from their work, and to and from each others' houses, either on business or as visitors. The trial court directed a verdict in favor of the defendant on the ground that the child was a trespasser. In reversing the decision the appellate court said: "When, therefore, for a considerable period, numerous persons have been accustomed to walk across the railroad track or along a railroad track between given points either for business or pleasure, railroad engineers should take notice of such practices, and when approaching such places, should be required to exercise precautions to prevent injuring them. Know-

ing the usage which prevails, they may reasonably be required to anticipate the probable presence of persons on or near the track at such places, and to be on the lookout when their attention is not directed to the performance of their other duties. The natural impulses of a person who has a proper regard for the welfare of others would prompt him to thus act."

Cahill v. Railroad Company 46 U. S. app. 85-89, 20. C. C. A. 186. and 74 Fed. 287: "That in places on railroad tracks where people are accustomed to come and go frequently in considerable numbers and where, by reason of such custom, their presence upon the track is probable, and ought to be anticipated, those in charge of passing trains must use reasonable precautions to avoid injury, even to those who, in a strict sense might be called trespassers."

Felton v. Aubrey, 43 U. S. App. 278-296, 20 C. C. A. 445 and 74 Fed. 359 (6th Circuit):

If a railroad company "Has permitted the public for a long period of time habitually and openly to cross its tracks at a particular place or use the track as a pathway between particular localities, it can not say that it was not bound to anticipate the presence of such persons on its track and was therefore not under any obligations to operate its trains with any regard to the safety of those there by its license."

In a very able opinion by Chief Justice Lord in *Ward v. Southern Pacific Company*, 25 Or. 437, it is said: "A railroad company has the right to the ex-

clusive use of its track unless a right-of-way or a foot path over it has been acquired by its consent, express or implied, or a joint use has been reserved to the public as at a public crossing. There is no doubt that if the company permitted the public for a long time, to travel or habitually pass over its track, at some given point, or use it as a footpath between different points, without objection or hindrance, its consent or acquiescence in such use might be presumed, and it would be bound to manage and run its trains with reference thereto. In such cases the company and the people have a common right or joint use in the track as a public use, and the right of each must be regarded."

Teakle v. San Pedro, L. A. & S. L. R. Co., 90 Pac. 407 (Utah.): "From the authorities we are inclined to adhere to the rule already announced by this court that when for a considerable period numerous persons have been accustomed to walk across or along a railroad track in a thickly settled community or populous city, as shown by the evidence in this case, train operatives ought to be required to take notice of such usage, and to anticipate the probable presence of persons on or near the track, and to observe a reasonable lookout when their attention is not directed to a performance of other duties." In the Teakle case the deceased was injured while walking the defendant's track through its yards, which were inclosed and which had been generally used and traveled by men,

women and children as a thoroughfare for eight years or more without objection. The tracks were along a thickly populated portion of the city; there was a notice warning trespassers to keep off, but the employees of the defendants knew of the use of the track by the public and made no objection.

Cedarson vs. O. R. N. Co., 38 Ore. 362: Deceased was killed while traveling over a wagon road running on defendant's right of way and in close proximity to defendant's track. While so walking along, defendant's car left the track and struck him. The court said: "The wagon road at that point was in frequent and constant use by Seufert Bros, Company's employees, both on foot and with teams, especially during the fishing season, and more or less by the general public. This state of affairs continued for a long time which, taken in connection with the manner in which the wagon road was constructed, and its proximity to the side track, tends in some measure at least, to show that defendant was cognizant of the conditions, and that they so existed with something more than its tacit consent, or, rather, that they existed with their approval. If the decedent was licensed by invitation or inducement then it was incumbent upon the defendant to exercise active vigilance in respect to him. It was forewarned, and should have been forearmed." Other cases expressing the same view are *Taylor vs. Canal Company* stl. Atlantic 43; *Barry vs. Railroad Company*, 92 New York, 289-292;

Roth vs. Depot Company, 13 Washington, 525, and cases there sighted; Frick vs. Railway Company, 75 Mo., 595-610.

The rule as given in the above cases, is supported by abundant authority and good ^{service} service. where railroad company without a single protest allows people generally to use its track as a thoroughfare in such manner and for such time that they are led to believe that they are welcome, the company should not then be allowed to run its trains in absolute disregard of those conditions. A proper regard for human safety, demands that they should anticipate the presence of pedestrians at these places and use reasonable diligence to avoid injuring them; the amount of diligence to depend upon all the surrounding conditions; and in each case to be determined by jury. Upon this question, therefore, the court properly held that there was sufficient evidence to take the case to the jury.

DEFENDANT WAS NEGLIGENT

Assuming that the jury should determine that plaintiff was an invitee by implication; That defendant should have anticipated his presence upon the track, and that defendant should have given him reasonable warning of the approach of the train—taking up the next question, the evidence shows that;

Defendant failed to give plaintiff due notice and a timely warning of the approach of its train—

—All the witnesses agree that the night was dark.

(Testimony of Thomas Evans.)

It appears very clearly from the evidence that as the train backed down there in the dark, there was no light, signal or lookout upon the approaching end of the train; that there was no bell rung nor whistle sounded, and the defendant made no effort whatsoever to warn plaintiff of its approach.

TESTIMONY OF THOMAS EVANS (plaintiff)
(Transcript 31.):

Q. Now state, was there anybody on the rear end of that train when you were struck?

A. No, sir.

Q. Was there any light there or anything?

A. Nothing at all.

Q. Well, were you looking and listening?

A. Yes, sir. I was looking straight ahead.

TESTIMONY OF MR. EMMETT. (Transcript
71-74.):

Q. Well, now, sir. What was the first thing you noticed?

A. The first thing I noticed?

Q. Yes. In regard to the train after you had got on the track?

A. When I got on the track?

Q. After you got on the track?

A. After I got on the track?

Q. Yes. When he was struck.

A. When he was struck. There was a man came

(Testimony of Mr. Emmett.)

to the door with a lantern just as the train struck him and halloed "lookout, lookout."

Q. Just as the train struck him?

A. Just as the train struck him.

Q. Where did this man come from?

A. Just came right out of the coach.

Q. Out of what part of the coach?

A. The rear end, right out the door.

Q. The end, you mean, towards you?

A. Yes, sir.

Q. Towards Evans? Well, now, which happened first—did the train strike Evans first, or did the man come out of the coach first?

A. There wasn't but very little difference. You could hardly tell.

Q. Just tell the jury what you saw about that just as near as you can.

A. Well, just about the time the train struck the boy, the man came to the door with the lantern, and he halloed "look out" and it just knocked the boy down and ran over his leg. And I crawled down to see where he went to. I never expected to see him alive.

Q. JUROR—How far were you from the train then?

A. About eight or ten feet.

Q. Do you know who that was that had the lantern?

(Testimony of Mr. Emmett.)

A. Well, I suppose it was the conductor.

Q. Did you see anything of the brakeman?

A. No, sir.

Q. Well, now, up to the time that the man came out of the rear door with the lantern, up to that time was there any light on the rear of that train?

A. No, sir.

Q. You swear to it?

A. There was no light.

Q. Was there any lookout?

A. All the light you could see was what was shining through the glass of the door.

Mr. FENTON—Through what?

A. He would have to look up to see the light shining through the glass of the door.

Mr. FENTON—Through the panel of the door.

A. Yes, sir.

Q. You saw that afterwards did you?

A. Just as the door opened I could see, when the train was coming and it didn't any more than give me time to get off.

Q. Were you looking all the time as you were coming down there to see if there was any train coming or in the way?

A. I don't know if I would have seen it if the door hadn't opened, myself.

Q. Was it pretty dark?

A. Fairly dark, yes.

(Testimony of Mr. Worthington.)

Q. Now, was there any whistle blown or any bell rung there right before that accident?

A. Well, I didn't hear any myself.

Q. Well, were you in a position where you would have heard if it had been sounded?

A. I expect I would.

Q. Was there any signal of any kind given so as to warn Evans or yourself of the backing of that train?

A. Not that I know of.

TESTIMONY OF MR. WORTHINGTON, who was a passenger, sitting near and facing the end of the coach that struck plaintiff. (Transcript 128.):

Q. Now, just tell the jury what the first thing was that you noticed, and what you saw and heard at the time of that accident.

A. Well, the first thing I heard was a signal for the train to stop; and, well, before that, before the signal, I seen the conductor, Mr. Keyser, come through the coach; he had a lantern in his hand. He stepped to the door, and just as he opened the door and stepped on the platform he said "Lookout Lookout"; and at that why he stopped the train—give a signal to stop the train.—

Q. Which side of the train were you on?

A. I was on the river side.

Q. And the conductor came right there; and you

(Testimony of Mr. Worthington.)

were sitting here facing the back end and he came through and opened the door?

A. Yes, sir

Q. How long after he had opened the door was it before he halloed?

A. Just as soon as he got on the platform he says, "lookout, lookout," at that he——

Q. Did he hallo in a frightened sort of way—shout to them?

A. Well, he halloed pretty loud.

Q. Well, sir, did you hear the bell ring?

A. I did not.

Q. Or the whistle sound?

A. No, sir.

Q. Would you have heard—were you in a position so you probably would have heard?

A. Well, I could not particularly say about that because I was not paying much attention.

(Page 134, Cross Examination.)

Q. And you saw the conductor come through with his lantern, and you saw him go outside and call out to somebody you didn't know who it was.

A. No, sir.

Q. "Lookout, Lookout?"

A. Yes, just as he opened the door he stepped out and says "Lookout, Lookout."

TESTIMONY of MR. ELSTON, a passenger on the train standing on the platform between the two

(Testimony of Mr. Elston.)

coaches at the time of the accident. (Transcript 107.):

Q. You heard the signal to stop plainly?

A. I did.

Q. Did you hear and bell rung in the engine?

A. Well, sir, that I couldn't say. I don't remember of hearing any bell at all. There was nothing that I remember of.

Q. Did you hear any whistle blown?

A. I did not.

Q. Were you in a position where you would have been likely to have heard a bell or whistle?

A. I was in a position to have heard it, but at the same time I would not probably have noticed it, not thinking anything at all.

Defendant's brakeman Mr. Scruggs, admitted that he was inside of the coach with the markers or colored lights at the time of the accident. There was some evidence that the door of the coach possessed a glass panel; and that coaloil lamps were burning inside; but aside from that, defendant's contention that there was a light or lookout on the end of the coach rests solely upon its claim that the conductor was there with his lantern from the time the train left Wilsonia until plaintiff was struck. Failing to produce anybody that saw or knew he was there, defendant's testimony on this point is confined to the evidence of Mr. Kayser, the conductor. After testi-

fying that he was on the platform, Mr. Kayser said: (Transcript 332.):

“And in the shadow of the darkness I saw two men coming down the track, and they were running, and I called to them to look out for the cars, the train is backing up, and one of the men got off the track, and as he did he spoke to his partner—I didn’t know who they were at that time—to get off the track! and his partner used some profane language, something like saying he would catch them anyway. But I saw that he was not going to get off the track, and I reached up and stepped on the threshold of the door—I had to reach the cord; it is about four inches higher than the platform, the threshold is and it makes it easier to reach it that way—and just before we stopped we caught this Mr. Evans right in the face.”

That a man should use profane language and say that he would catch the train anyway, after he had been notified by both Emmett and the Conductor, that the train was coming right at him, seems somewhat incredible.

The evidence of Mr. Evans, Mr. Emmett, his companion and Mr. Worthington, a passenger on the train all go to prove that the conductor did not reach the platform until the plaintiff was struck. Considering this evidence together with the above unusual statement of Mr. Kayser, it is very clear that the conductor did not arrive with his lantern until too late, and that defendant failed to provide any light

or lookout and failed to give plaintiff timely warning—And the court properly held that there was sufficient evidence to go to the jury on the question of defendant's negligence.

WAS PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE?

Before reaching the track, plaintiff could see, from the side lights, the train at Wilsonia, headed for Portland. This was the last train that evening and plaintiff and Worthington were on their way to take it. They had no watch and did not know the exact time; yet they knew it was about starting time. It had not been customary for defendant to back its train from Wilsonia to Oswego in the night time; and these two men knew of the long established custom of the company to perform its switching operations at Oswego. It was dark; there was no lights or lookout on the end of that train to enable them to see, and no bell rung or whistle blown to enable them to hear. If but a single inference can be drawn from these facts, it is indeed the inference that, because defendant failed to provide the ordinary and only means of seeing and knowing, plaintiff was unable to see and know of the approach of the train.

It is true that there was evidence to the effect that coal oil lamps were burning inside the coach, and that there was a glass panel in the door of the coach, and that the exhaust of the engine on the opposite end of the train was making some noise—but plaintiff

had a right to assume that defendant would provide the usual and necessary lights and warning on the end of that coach. It was not incumbent on him to stop at every step and peer ahead through the darkness in the attempt to discover the faint reflection of coal oil lamps in the panel of the door; nor was it incumbent on him to stop and try to determine by the sound of the engine on the opposite end of the train, several hundred feet ahead, whether a train that he could not see was coming towards him. He was in a hurry; he had no reason to assume that defendant would be backing the train from Wilsonia to Oswego in that unusual manner; he had a right to expect in the event of the backing of the train, sufficient, proper and timely warning would be given him.

The reflection or glow of the light in the panel of the door of a coach, is only discernible on a dark night at a very close range. The panel of the coach door sets high. A person traveling along a path on a dark night must give most of his attention to the path, lest he stumble or get off his course. When the position of the engine on the train, the custom of the company, the absence of lights or lookouts, and every circumstance indicate that the train is proceeding, or is about to proceed, in the opposite direction, an ordinarily careful man would be less inclined to discover the faint glow in the door panel, than if all the circumstances should put him on his notice.

Defendant did e verything in its power to lead

plaintiff to believe that the train was on its way to Portland; it did nothing whatever to notify plaintiff that it was proceeding to Oswego. Is it possible that a railroad company will be allowed to lull a person into a feeling of safety and then slip upon him in the dark in this manner, and escape liability as a matter of law, because it might have been possible for him to see a faint glow in the door panel, if he had been looking skyward just an instant before being struck? Reasonable and ordinary care does not demand the highest degree of care or the discovery of every possible source of danger. Ordinary care in this case demanded that plaintiff pay attention to his course and to look for the ordinary signs of danger.

All the evidence shows that plaintiff did not see the reflection in the door panel; but if it be conceded, for argument, that he did see it, what right then, did he have to suppose that the train was coming toward him. There was no signal or lookout to warn him. Practical experience teaches us that, when a reflection or steady light in the night is moving directly away or is coming directly toward a person, it requires very close observation and is difficult to tell which way it is moving. When everything indicates that the train is going in the opposite way, such a light is no warning whatever.

The fact that Emmett did not see the light in the panel but that he saw the conductor's lantern when the door was opened, just as plaintiff was struck, and just in time for Emmett to escape, is good evidence

that Emmett was looking and a strong presumption that the reflection through the panel of the door was insufficient warning under all the circumstances. Had the conductor appeared at the door with his lantern an instant sooner it is reasonable to assume that plaintiff, who was about ten or fifteen feet ahead of Emmett, would have seen in time to escape also.

It was error for the court to direct a verdict for defendant, on the ground of contributory negligence. That question as well as that of defendant's negligence, should have been submitted to the jury under proper instructions.

In Thompson on negligence, vol. 1, page 409 it is said:

“In the courts of the United States, it is frequently said that the trial court is bound to submit the case to the jury unless no recovery could be had upon any view that could properly be taken of the facts which the evidence tends to establish.” Again, “This necessarily results from the premise that in every system of jury trial, and especially in the United States, where the right of trial by jury in actions at common law is guaranteed by constitutional sanctions, the judge cannot presume to determine whether a given proposition of fact has been proved or disapproved, where the evidence is conflicting, or where the credibility of witnesses is involved; for so to do would invade the province of the jury and infringe the constitutional right of trial by jury.”

Jones vs. Tennessee & C. Ry. Co., 128 U. S. 445, in reversing a directed verdict for defendant, the court said: "Plaintiff himself states that he was in the depot of defendant on business, that the passenger platform alongside the track which ran between it and the depot; there was also a sidetrack that went through the depot; that he passed out of the depot the usual way, and was struck between the wall of the depot and the platform. He further says that the way he was going he could not see a train approaching from the ^{east} each, because there was a car on the sidetrack, and he had no warning of an approaching train, although he listened as he went out of the depot. There is also some evidence that there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished.

:

"On the other hand, there is some testimony to show that the plaintiff ran carelessly through the depot, that he knew the train was approaching and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him. But we think these are questions for the jury to determine. We see no reason so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of facts, why it should not decide such questions as these as well as others. There is nothing in a case in which it is conceded, fully and unreservedly that the

defendant company is in fault on account of the manner of running its trains, such as the high rate of speed and other careless matters mentioned by the court in its instructions, which should justify the court in refusing to submit to the jury the question whether the defendant company is relieved from liability incurred by it by reason of the acts of the plaintiff, showing that in some degree he may not have been as careful as the most cautious and prudent would have been. Instead of the course here pursued a due regard for the respective functions of the court and the jury seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would secure a sound verdict. We think this case is covered by that of *Kane vs. N. Northern Central Ry. Co.*, Ante, 91."

The doctrine in this case and the *Kane* case is again affirmed in *Dunlap vs. North Eastern Ry. Co.*, 130 U. S., 649, in which last case the appellate court again reversed a directed verdict for the reason set out in the *Jones* and *Kane* cases

This doctrine is so well established that further authority seems unnecessary.

We, therefore, submit that the Court erred in directing a verdict for defendant; that the question of contributory negligence is one for the Jury; and under the law and evidence the case should have been submitted to the jury with proper instructions.

John M. Goarin
Latonath. Latonath
 Attorneys for Plaintiff in error.

No. ~~2091~~

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>THOMAS EVANS, <i>Plaintiff in Error,</i> VS. SOUTHERN PACIFIC COMPANY, <i>Defendant in Error.</i></p>
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BRIEF OF DEFENDANT IN ERROR

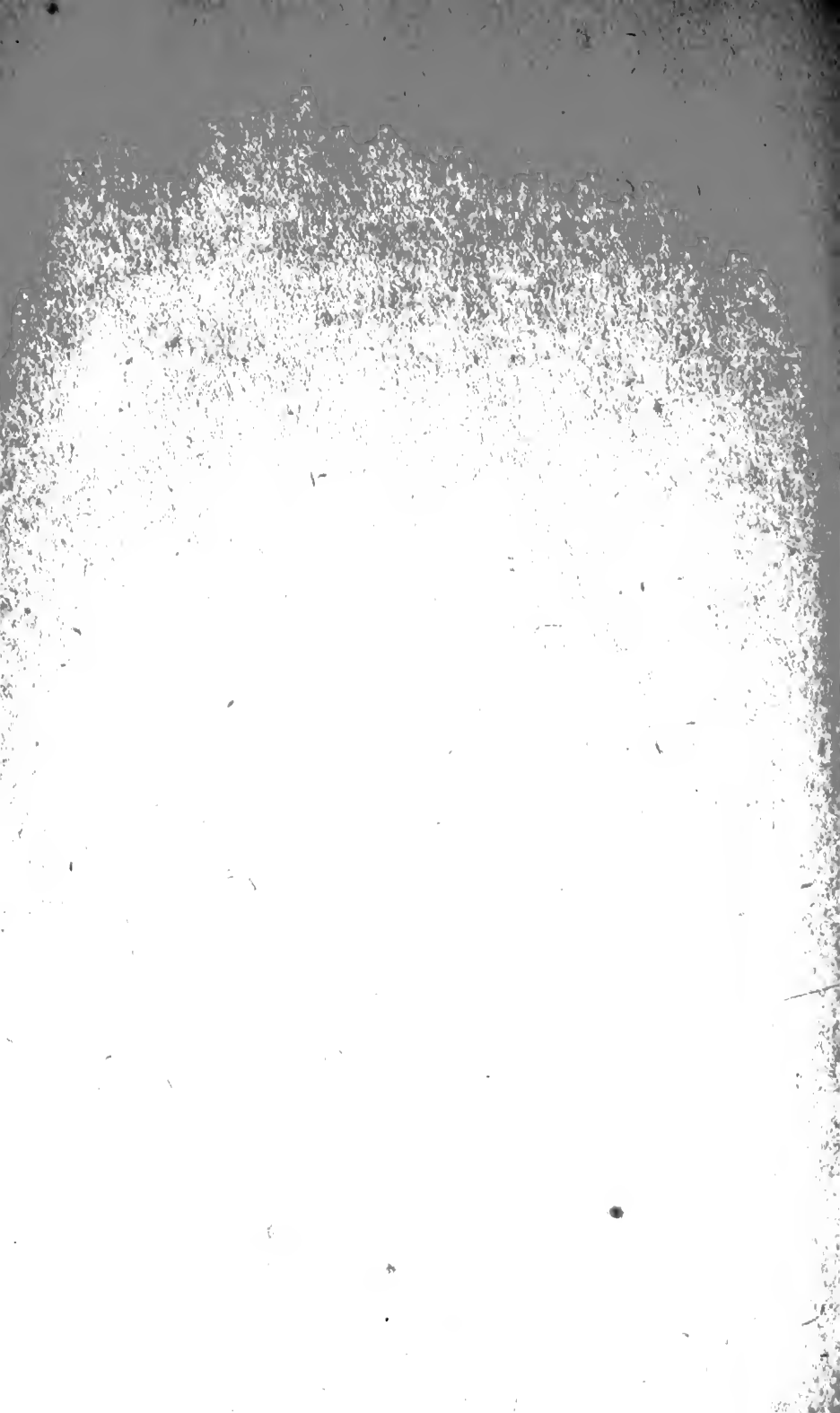
Upon Writ of Error to the United States Circuit (now District)
Court for the District of Oregon.

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FILED

SEP 4 - 1912



No. _____

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS EVANS,
Plaintiff in Error,
VS.
SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States Circuit (now District)
Court for the District of Oregon.

STATEMENT OF THE CASE.

This is a writ of error directed to the Circuit (now District) Court of the United States, for the District of Oregon, and is brought to reverse a judgment of the trial court directing the jury to return a verdict in favor of the defendant, in an action to recover \$10,000.00 damages for the loss of a leg, sustained by the plaintiff, a young man twenty-two years old, by coming in contact with one of defendant's trains while the same was being

backed from a flag station named Wilsonia to the town of Oswego, Clackamas County, State of Oregon, about nine miles south of the City of Portland, on the west bank of the Willamette River. The track on which the accident occurred parallels the Willamette River from Portland to Oswego, a small town of about three hundred inhabitants. Wilsonia, at the time of the accident, September 25th, 1909, was a flag station about thirteen hundred feet north of Oswego, and consisted of a platform with the name above, and was installed by the defendant for and used by a few families residing west of the track and on a range of hills paralleling the tracks and overlooking the river. There was and is a county road west of and between the tracks and this range of hills, which road extended past Wilsonia to Oswego and paralleled the railroad tracks. On the east of the tracks there was and is a gradual slope towards the Willamette River and on the low land adjoining the river, about half way between Oswego and Wilsonia, was and is situated the foundry of the Oswego Iron Works, which, at the time, was not in operation. This foundry was about four hundred feet east of the tracks and three or four foot-paths lead up from the same to and across the tracks between Wilsonia and Oswego. These paths were used primarily by the employes of the Oswego Iron Works in going to and returning from their work. These employes resided mainly in Oswego and those portions of Oswego called Old and New Town, which were

south and west of Wilsonia. One of the foot-paths leads up towards the station of Wilsonia.

On the evening of September 25th, 1909, plaintiff bought a ticket entitling him to passage over defendant's line from Portland to Oswego and return, and came to Oswego to visit some friends and went coon hunting with them in the evening, intending to return to Portland from Oswego on the train leaving there at 10:45 the same evening. At about train time plaintiff was with his friend Emmett, (a witness in the case) at a barn down near the foundry of the Oswego Iron Works. Not having a watch, but realizing that it was about train time, plaintiff, with his friend Emmett, started up one of these paths towards Oswego. After starting they heard a train switching at Wilsonia and saw the side lights and imagined it was getting ready to leave for Portland, and without any lantern, they ran up the hill along one of these paths and came on to the right of way of the defendant about six hundred feet south of Wilsonia. On reaching the tracks they were out of breath but hurried as fast as they could down the right of way between the rails towards Wilsonia to catch the train, plaintiff being in the lead. They had gone three hundred fifty or three hundred and seventy feet in that direction when the train, which was backing up towards Oswego, ran into plaintiff while between the rails and crushed one of his legs so that amputation was necessary.

Plaintiff in his complaint alleged that in order

to return to Portland he found it *convenient* to catch the train at Wilsonia by taking an open and commonly used trail up to defendant's tracks at a point———feet south of Wilsonia, and thence along the track to Wilsonia. That while approaching defendant's tracks, he *could and did see the side lights of defendant's train* standing at Wilsonia, headed towards Portland, and apparently ready to depart therefor. That said pathway was continuously used by the public, and *particularly by persons desiring to take defendant's train at Wilsonia*, and that said use was known to and permitted by defendant, and that the public was invited to travel over said route. That defendant, without the usual or any light or signal on the rear end of said train, or without ringing the bell or sounding a whistle or signal of warning or notice, backed said train into plaintiff, crushing one of his lower limbs. It will thus be seen that plaintiff claimed to be a licensee, and that being so, defendant was bound to operate its trains in anticipation of his probable presence on the track at ten o'clock at night, and that defendant was negligent in this duty in backing its train towards Oswego without any light on the rear end or without any notice or warning.

Defendant filed an answer denying the material allegations of the complaint and setting up as an affirmative defense that plaintiff was a trespasser on the tracks and was guilty of contributory negligence in running along between the rails in an effort to catch the train. A reply denying this

affirmative matter was filed, and at the trial, after both parties had rested, upon motion of defendant, the trial court directed the jury to return a verdict in favor of defendant, on the ground that the evidence showed conclusively that plaintiff was guilty of contributory negligence, causing the injury. This ruling of the trial court is assigned as error. The following three questions arose at the trial, and are discussed in plaintiff's brief.

(1) Was plaintiff a trespasser or a licensee, and what was the duty owing plaintiff by defendant?

(2) Was defendant negligent in operating its train with respect to its duty, if any, owing to plaintiff?

(3) Was plaintiff guilty of contributory negligence as a matter of law.

Although the third question is the only one properly before this court, and the one which is determinative of this case, in view of plaintiff's brief, we deem it advisable to briefly discuss the first two points.

POINTS AND AUTHORITIES OF DEFENDANT IN ERROR.

WAS PLAINTIFF A TRESPASSER OR LICENSEE?

(1) Plaintiff in going on to defendant's tracks and hurrying north to Wilsonia between the rails at ten o'clock at night, was a trespasser, and defendant owed him no duty other than not to willfully or wantonly injure him after having discovered him in that position.

Texas & Pacific Ry. Co. v. Modawell, 5th Circuit, 151 Fed. 421, 426.

Southern Railway v. Fiske, 8th Circuit, 159 Fed. 373, 377.

C & O Ry. Co. v. Hawkins, 4th Circuit, 174 Fed. 597, 599.

(a) To establish a use of a railroad track by implication or by invitation, the proof must be clear, convincing and positive, and the mere fact that a use is established in the daytime does not necessarily imply a use at night.

White Personal Injuries on Railroads, vol. 2, sec. 1064.

Eppstein v. Missouri Pacific Ry. Co., 197 Mo. 730, 734.

Frye v. St. Louis etc. Ry. Co., 200 Mo. 377, 401, 405.

WAS DEFENDANT NEGLIGENT?

(2) Assuming plaintiff was a licensee, defendant did everything that reasonably could be required

of it to anticipate the probable presence of plaintiff on the track between stations at ten o'clock at night.

N. P. Ry. Co. v. Jones, 9th Circuit, 144 Fed. 47, 49, and cases cited.

Garner v. Trumbull, 94 Fed. 321, 322.

N. P. Ry. Co. v. Curtz, 9th Circuit, 196 Fed. 367, 369.

WAS PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE, AS A MATTER OF LAW?

(3) A railroad track is notice of danger and imposes upon the traveller or person using it, whether he be a licensee, or trespasser, the duty of exercising the highest degree of care. In other words,—he takes the risk subject to its concomitant perils.

N. P. Ry. Co. v. Jones, 9th Circuit, 144 Fed. 47, 50.

Rich v. Chicago, etc. Ry. Co., 148 Fed. 79, 85.

Garlick v. N. P. Ry. Co., 131 Fed. 837, 839.

Elliott v. Chicago etc. Ry. Co. 151 U. S. 245, 248.

(4) It is the duty of one approaching a railroad track, or one using it, to look and listen for the approach of trains, and to ascertain his position and the surrounding circumstances, and a failure to exercise the degree of care required under the circumstances, is negligence.

White Personal Injuries on Railroads, vol. 2, sec. 1092.

Blount v. Grand Trunk Ry. Co., 61 Fed. 375,
379

Pennsylvania etc. Ry. Co. v. Peebles, 67 Fed.
591, 593

Gilbert v. Erie Ry. Co., 97 Fed. 747, 750

Neininger v. Coran, 101 Fed. 787, 791

Railroad Co. v. Houston, 95 U. S. 697, 702

Schofield v. Chicago, etc. Ry. Co., 114 U. S.
615, 618

N. P. Ry. Co. v. Freeman, 174 U. S. 379, 382.

(5) Even if defendant was negligent in not providing lights, or in not giving sufficient warning, plaintiff is not relieved of the obligation imposed by law to take ordinary precaution for his own safety, and if guilty of contributory negligence, he cannot recover.

N. P. Ry. Co. v. Jones, 144 Fed. 47, 49 and
cases cited. (9th Circuit)

Rich v. Chicago, etc. Ry. Co., 149 Fed. 79,
84.

Railroad Co. v. Houston, 95 U. S. 697, 702

N. P. Ry. Co. v. Freeman, 174 U. S. 379, 383.

(6) Where the facts, or the fair inferences to be drawn from the facts with respect to contributory negligence, are doubtful, the case is one for the jury, but where, as in this case, from any proper view of the undisputed or established facts, the conclusion necessarily follows, as a matter of law, that the plaintiff cannot recover, it is the duty of the trial court to direct a verdict. In other words,—if the trial court, in the exercise of a sound, judicial

discretion, would be compelled to set aside the verdict, a directed verdict should be granted.

- N. P. Ry. Co. v. Jones, 9th Circuit, 144 Fed. 47, 52, and cases cited.
- Russell v. Oregon Short Line, 9th Circuit, 155 Fed. 22, 25.
- Morgan v. N. P. Ry. Co., 9th Cir., 196 Fed. 449, 453
- Tucker v. B & O R. Co., 59 Fed. 968
- Kirtley v. Chicago, etc. Ry. Co., 65 Fed. 386, 392
- McCann v. Chicago, etc. Ry. Co., 7th Circuit, 105 Fed. 480, 483
- Work v. Chicago, etc. Ry. Co., 7th Circuit, 105 Fed. 874, 878
- Mobile etc. Ry. Co. v. Cverver, 7th Circuit, 112 Fed. 489, 493, 494
- Dunworth v. Grand Trunk Ry. Co., 7th Circuit, 127 Fed. 307, 308
- Garlich v. N. P. Ry. Co., 8th Circuit, 131 Fed. 837
- Rich v. Chicago, etc. Ry. Co., 8th Circuit, 149 Fed. 79, 84
- D & H R Co. v. Wilkins, 2nd Circuit, 153 Fed. 845, 848.
- Ellis v. Southern Ry., 8th Circuit, 163 Fed. 686, 689
- Hart v. N. P. Ry. Co., 8th Circuit, 196 Fed. 180, 185, 187
- Schofield v. Chicago, etc. Ry. Co., 114 U. S. 615, 618
- Gunther v. Liverpool, etc. Ins. Co., 134 U. S. 110, 116
- Deleware etc. R. Co. v. Converse, 139 U. S. 469, 472

- Elliott v. Chicago, etc. Ry. Co., 150 U. S. 245, 246
 S. P. Co. v. Pool, 160 U. S. 438
 Texas etc. Ry. Co. v. Gentry, 163 U. S. 353, 366, 440
 N. P. Ry. Co. v. Freeman, 174 U. S. 379, 383
 District of Columbia v. Moulton, 182 U. S. 576, 579
 Marande v. Texas etc. Ry. Co., 184 U. S. 173, 191

ARGUMENT.

Plaintiff has attempted to show that he had been invited by the defendant to use the space between the rails as a foot-path from a point about six hundred feet south of Wilsonia down to the station. It is a well settled rule of law that a railroad company owes no duty to a trespasser on a railroad track except not to willfully or wantonly injure him after discovering his peril. (See authorities under point 1.)

The question of being able to avoid the injury after discovering plaintiff on the track, does not appear in this case, nor is it raised by the pleadings, the failure to warn and notify the plaintiff that the train was backing up being the only charge of negligence against the defendant. Neither is it claimed that defendant willfully or wantonly injured plaintiff. Before plaintiff can recover on his theory of the case, he must therefore establish that he was a licensee in the use of the space between

the rails, between the point where the path crosses the track and Wilsonia, and that defendant neglected its duties in that respect towards him.

It is well settled in both state and federal courts that before the use of a private right of way for railroad purposes, such as the defendant's, can be said to be used by the public by implication, license or invitation, that use must be proven by clear, satisfactory and convincing testimony. Reference to the case of *Frye v. St. Louis Ry. Co.*, 200 Mo. 377, is sufficient to establish this point. Mere silence or non-interference by a railroad company in the use by the public of its tracks, will not imply a license to use them.

See *Gretchen v. Chicago, etc. Ry. Co.*, 22 Fed. 609, and cases cited in foot-note in 2nd Amer. & Eng. Ann. Cases, 550. See also *Ward v. S. P. Co.*, 25 Ore. 433, 437. And as stated in Vol. 2, *White on Personal Injuries on Railroads*, Section 873;

“A license to walk on a railroad track cannot be established by proof showing that the place was remote from any station, and that persons living near it had been in the habit of walking on the same; that the railroad company's employees had seen persons walking on it and that no steps had been taken to prevent such user, as this only amounts to a mere passive acquiescence in the use of the track and does not show any invitation, either express or implied to so use it, on the part of the railroad company.”

This proposition is ably discussed in the case of Cleveland, etc. Ry. Co. v. Tartt, 64 Fed. 823, where the court, speaking through Judge Baker, at page 826 said:

“The decedent, accompanied by his son, was, when killed, walking on or dangerously near to the track of the company. He was not on or near any high way or street crossing. He was traveling along the right of way for his own convenience, without any invitation, express or implied, and with knowledge of the danger to life and limb from passing trains. It is true that he was killed while attempting to rescue his son from impending peril, but he had, by his own voluntary act, brought his son into a situation of danger, which gave rise to the peril. The only excuse offered for such conduct was that the defendant had suffered other people to travel along its right of way without interference or objection. He was traveling upon the defendant’s right of way, not for any purpose of business connected with the railroad, but for his own convenience, as a footway, in reaching the village of Venice. The right of way was the exclusive property of the defendant, upon which no unauthorized person had the right to be for any purpose. It was a place of known danger, and there was nothing to exempt the decedent from the character of a wrongdoer and trespasser in traveling along the right of way further than the implied consent of the defendant arising from its failure to interfere with the previous like practice by others. But because the defendant did not

enforce its rights, and warn people off its premises, no right was thereby acquired to use its roadbed as a place for public travel. At most, it was used by sufferance, which amounted to no more than a mere naked license, and imposed no obligation on the part of the owner to provide against the danger of accident. The person who used the right of way for his convenience went there at his own risk, and enjoyed the implied license with its attendant perils. *Elevator Co. v. Lippert*, 18 U. S. App. —, 11 C. C. A. —, 63 Fed. 942. The decedent, then, stood in no more favorable position than that of a wrongdoer, or trespasser. He was at the time of the accident in the exercise of no legal right, and at most was in the enjoyment of a naked license implied from the previous use of the right of way by others; and the rights and obligations of the decedent and the company are to be measured as in the case of parties thus situated. Where both parties are equally in the position of right which is enjoyed by each independently of the other, the plaintiff is only bound to show that the injury was occasioned by the negligence of the defendant, and that he exercised ordinary care to avoid it. But where the plaintiff is a wrongdoer or trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was willfully inflicted, or that it was caused by

negligence so gross as to authorize the inference of willfulness.”

Plaintiff testified and also alleged in his complaint that he used the track as a matter of *convenience*. In paragraph 872, White, in his work on Personal Injuries on Railroads, Vol. 2, distinguishes as follows between a mere licensee and an invitee:

“The legal distinction which exists between the obligation which is due by the owner of premises, to a mere licensee, who enters thereon, without any enticement or inducement, and the duty owing to one who enters upon lawful business, by the invitation, express or implied, of the proprietor, is well settled by the cases and the established principles of the law. The former enters at his own risk; the latter has a right to believe that, taking reasonable care of himself, all reasonable care has been used by the owner to protect him, in order that no injury may occur.”

And in paragraph 870, Vol. 2, the same author says:

“In the absence of some relation which enures to the mutual benefit of the owner of the premises and the injured person, or to the former alone, there is generally held to be no implied invitation on the part of the owner.”

In this case it is true plaintiff intended to catch the train at Wilsonia, but it is equally true, and it is admitted, that he originally intended to take the train at Oswego, but as a

matter of *convenience* to himself, took the path and the track to Wilsonia. Clearly, no invitation was held out to him to so use this track.

It is also well settled that although continued use of a company's tracks with the knowledge and acquiescence of the company will create a license to use the tracks in the day time, it will not necessarily create a license or invitation to use the tracks at night. It is sufficient to call the court's attention to the case of *Frye v. St. Louis etc. Ry. Co.*, 200 Mo. 377, where the court in discussing this proposition, at pages 401, 405, said:

"In this case, if it be conceded, *arguendo*, the use of the track was so open, so continuous and so pronounced that knowledge of the day-time use would be inferred, yet it must be apparent no such use was established for the nighttime. Plaintiff's learned attorneys sought to establish the night use, but their evidence fell short of proving a case to go to the jury on that issue. The night use of this track by pedestrians was confined to two classes; first, the class to which plaintiff belonged, to-wit, the mill men living at Mill Springs and working at Leeper, some eight or ten in number; and the utmost the evidence tends to show is that when the days were short and the nights long these men used this track after dark to come and go, as plaintiff did."

"We are pointed to no case going as far as plaintiff insists we should go in order to sustain this judgment; and, confining our conclusion on this branch of the case to the precise facts

of the record, that conclusion is that at the place Mr. Frye was struck by defendant's engine, and at the time, to-wit, in the night-time, it was a place and a time where defendant not only had the right, but it was entitled, to expect a clear track. Hence, it was a place defendant owed plaintiff no duty to look out for him; and, hence, in order to recover, plaintiff must show that he was actually seen by the engineer in time to have warned him and thus avoided his injury. (Rine v. Railroad, 88 Mo. 392; Barker v. Railroad, 98 Mo. 50; Sinclair v. Railroad, 133 Mo. 233; Reyburn v. Railroad, 187 Mo. 565.)"

The testimony introduced to show an invitation to use the space between the rails may be summed up as follows: The greater portion was to the effect that the workmen of the Oswego Iron Works used the paths from the foundry leading up to the tracks, then across and up the hill to Oswego and Old and New Town. There is considerable testimony also that people walked the tracks as a matter of convenience from a point six hundred feet south of Wilsonia to Oswego. There is some testimony tending to show an intermittent use in the day time from Wilsonia south towards Oswego, and that the defendant never tried to stop such use. There is practically no testimony showing a use at night, that of plaintiff's witness, Roy Fox, being the only testimony introduced by plaintiff during the trial, which testimony is as follows: Transcript, page 173.

Q. Have you seen people traveling night and day?

A. Yes, sir.

Q. All times of day and night?

A. Yes, sir. I have traveled it myself.

Defendant's witnesses H. M. Mooney, transcript, page 280; F. S. Craw, transcript, page 292, and L. D. Keyzer, transcript, page 328, testified they had scarcely ever seen the track used at night.

It seems so apparent from reading the testimony that plaintiff at ten o'clock at night, in using this space between the rails, was a trespasser. The testimony clearly falls short of that required to establish an invitation to so use the tracks, and this case clearly falls within the doctrine laid down in *Eppstein v. Mo. Pac.*, 197 Mo. 720, where the court, at page 734, said:

"In a given case there might be such scant or neutral evidence of public user of a portion of a track—mere sporadic instances thereof—that a court, as a matter of law, would determine that the servants of a railroad company charged with the running of a locomotive engine, had no duty to look and see. In such case, unless they did see the dangerous exposure of a person on the track, and in time to avert injuring him by the use of ordinary care, the court would take the case from the jury."

It is respectfully submitted that there is no testimony in the record tending in any way to show an invitation to plaintiff or any other person to use

this space between the rails at ten o'clock at night *for the purpose of taking trains at Wilsonia, as alleged in plaintiff's complaint.*

One is inevitably brought to this conclusion when it is considered and not disputed that Oswego was, at the time of the accident, and is now a small town thirteen hundred feet or more south of Wilsonia, and that very few people lived on the hills in the space between Oswego and Wilsonia. That Wilsonia was and is a mere flag station with only a platform, and used by not over one hundred and fifty people, with no homes around it, and the closest being about eight hundred feet west across the county road and up on the range of hills. That the tracks were a private right of way not in a platted portion of a town site and one hundred feet or more from the county road, with a dangerous bridge a short ways north of Wilsonia where people had been forbidden by the railroad company from trespassing. As it is not contended that defendant discovered plaintiff on the track in time to have avoided injuring him, plaintiff cannot under any view of the law and evidence in this case, recover from the company, because there is no evidence of willful or wanton injury and because that contention does not arise under the pleadings.

WAS DEFENDANT NEGLIGENT?

If plaintiff was a trespasser he clearly cannot recover under the authorities cited in point 1. Assuming, however, for the sake of argument, that plaintiff was an invitee, the rule of law is clear and undisputed that the defendant is only bound to use reasonable care to avoid injuring him. That defendant in operating its train on the night of the accident exercised reasonable care, clearly and unmistakably appears from the following testimony. In fact, the testimony introduced by plaintiff to show negligence on the part of the defendant only strengthens and tends to corroborate defendant's version of the accident. It must be remembered that the only negligence charged is the failure to have a light on the rear end of the train while backing, or some other satisfactory warning given plaintiff. Plaintiff saw the lights of the cars and knew the train was at Wilsonia. Defendant's relation towards plaintiff was not that of an insurer.

N. P. Ry. Co. v. Jones, 144 Fed. 47.

At most, if plaintiff was an invitee, defendant only owed him the duty of exercising reasonable care, under the circumstances, not to injure him at a place on the track where it might reasonably anticipate he would be. In the exercise of this duty it had the right to expect plaintiff to exercise reasonable care and diligence to avoid being injured. As stated in N. P. Ry. Co. v. Jones, Ninth Circuit, 144 Fed. 47, and D & H R. Co. v. Wilkins, 153 Fed.

845, 847, and cases cited, "as against a bare licensee or invitee, a railroad company has a right to run its trains in the usual manner without special precautions, if the circumstances do not themselves give warning of his probable presence, and he is not seen until it is too late."

Thomas J. Evans, plaintiff, testified as follows:
Transcript, page 29.

Q. Mr. Evans, what kind of a night was it?

A. Well, it was rather dark.

Q. Was it raining?

A. No, sir.

Q. Cloudy?

A. Yes, it was cloudy and dark.

Q. What was the date of that?

A. The 25th of September.

Q. At about what hour?

A. I don't know the exact time but it was along about 10:45.

Q. In the evening?

A. Yes, sir.

Q. What amount of noise, if anything, was that train making? Did you hear anything?

A. Never heard a thing.

Q. What was the country there? Was it level or hilly?

A. Why, it was practically level.

Q. What was the road bed as to being level or otherwise?

A. It was level.

Transcript, page 31.

Q. Now, state was there anybody on the rear end of that train when you were struck?

A. No, sir.

Q. Was there any light there or anything?

A. Nothing at all.

Q. Well, were you looking and listening?

A. Yes, sir, I was looking straight ahead.

On cross examination he testified as follows:

Transcript, pages 51 and 52.

Q. You didn't hear the conductor or anybody else call from the train to look out for it?

A. No, sir, I did not.

Q. You didn't see it coming back?

A. No, sir, I did not.

Q. And yet you are willing to swear to this jury that you looked, you didn't see any brakeman or anybody else on the rear of that train, or any light there?

A. It was none there.

Q. How do you know, if you couldn't see the train and didn't see it?

A. Well, because it just knocked me off the side.

Q. I know, but if you looked and couldn't hear it, and didn't know it was there, how could you say whether there was a brakeman or a light on the rear of that train?

A. There was no light there or a man could see it.

Q. You said there was no conductor, no brakeman, or no man there.

A. I couldn't say there was any there—never seen any.

Q. You say there was no one there, but you mean to say you didn't see anybody?

A. I didn't see nothing at all.

Q. As a matter of fact, did you look?

A. Yes, I had my head up like any man would.

PETER JAMES EMMETT, plaintiff's witness, and companion of plaintiff on the track, testified as follows after describing how they heard the train switching at Wilsonia:

Transcript, pages 71 to 74.

Q. Well now sir, what was the first thing you noticed?

A. The first thing I noticed?

Q. Yes, in regard to the train after you had got on the track?

A. When I got on the track?

Q. After you got on the track.

A. After I got on the track?

Q. Yes, when he was struck.

A. When he was struck. There was a man came to the door with a lantern just as the train struck him, and hallooed "Look out, look out."

Q. Just as the train struck him?

A. Just as the train struck him.

Q. Where did this man come from?

A. Just came right out of the coach.

Q. Out of what part of the coach?

A. The rear end, right out of the door.

Q. The end you mean, towards you?

A. Yes, sir.

Q. Towards Evans? Well now, which happened first—did the train strike Evans first, or did the man come out of the coach first?

A. There wasn't but very little difference. You could hardly tell.

Q. Just tell the jury what you saw about that just as near as you can.

A. Well, just about the time the train struck the boy, the man come to the door with a lantern, and he hallooed "Look out," and it just knocked the boy down, and it ran over his leg. And I crawled down to see where he went to. I never expected to see him alive.

JUROR: How far were you from the train then?

A. About eight or ten feet.

Q. Do you know who that was that had the lantern?

A. Well, I suppose it was the conductor.

Q. Did you see anything of the brakeman?

A. No, sir.

Q. Well now, up to the time that that man came out of the rear door with the lantern, up to that time was there any light on the rear of the train?

A. No, sir.

Q. You swear to it?

A. There was no light.

Q. Was there any other look-out?

A. All the light you could see was what was shining through the glass. We would have to look up to see the light shining through the glass of the door.

MR. FENTON: Through what?

A. He would have to look up to see the light shining through the glass of the door.

MR. FENTON: Through the panel of the door?

A. Yes, sir.

Q. You saw that afterwards, did you?

A. Just as the door opened I could see, when the train was coming, and it didn't any more than give me time to get off.

Q. Were you looking all the time as you were coming down there to see if there was any train coming, or in the way?

A. I don't know as I would have seen it if the door hadn't opened, myself.

Q. Was it pretty dark?

A. Fairly dark, yes.

Q. Now, was there any whistle or any bell rung there right before the accident?

A. Well, I didn't hear any myself.

Q. Well, were you in a position where you would have heard if it had been sounded?

A. I expect I would.

Q. Was there any signal of any kind given so as to warn Evans or yourself of the backing of that train?

A. Not that I know of.

Q. Any noise of the train running, or anything that you could hear?

A. Of course the train would make a little noise.

Q. Did you hear any noise?

A. I wasn't paying any attention to the noise

particularly. I was expecting it was going the other way, and would start from Wilsonia.

Q. Was the wind blowing, do you know, that night?

A. No, I don't know.

Q. You say you and Evans had been running pretty fast?

A. Yes, sir.

Transcript, page 75.

Q. About the length of one coach? And what stopped the train, do you know?

A. Well, the man that come to the door pulled the string just after it struck him.

Q. What?

A. The man who came to the door pulled the string.

Q. Did you see that man around there afterwards that pulled the string?

A. He certainly was there some place.

Q. Are you satisfied who it was?

A. Well, pretty, yes.

Q. Do you know him?

A. Well, I suppose I do.

Q. Who was he?

A. I think it was Mr. Keyzer that come to the door.

Q. That would be the conductor on the train at that time?

A. Yes.

On cross examination he testified as follows:

Transcript, pages 90 to 92.

Q. And you didn't catch him?

A. I was just a little ways behind him.

Q. He kept ahead of you about 10 feet?

A. About 10 feet.

Q. Did you notice the train backing up at all before he was struck?

A. Not until he was struck.

Q. Just before he was struck you noticed the train was coming?

A. Just about the time it struck him.

Q. How far away from you was it when you first saw the train approaching?

A. About 10 feet.

Q. You mean you were 10 feet from the rear end?

A. From the rear end.

Q. Don't you think you were 20 or 25 feet away?

A. I don't think it was.

Q. Are you certain about that?

A. I know I was not so very far.

Q. Well, weren't you as much as 20 or 25 feet away when you first saw the train coming? I mean, knew it was coming?

A. No, sir, I don't think I was.

Q. Did you call to him to get out of the way?

A. Just about the time it struck him, I called to him.

Q. What did you say?

A. I says: "Look out."

Q. Whom did you speak to?

A. Tom Evans.

Q. What did you call him?

A. I says: "Look out, Tom."

Q. Did you yell.

A. I halloood just about as I said it.

Q. You said, "Look out, Tom."

A. Yes, sir.

Q. Did you say it that way.

A. I suppose I did.

Q. You thought he was going to be run over, didn't you?

A. Just as the door opened there when I saw it was coming.

Q. When you called to him, you thought he was going to be run over any way, didn't you?

A. Sure, or I wouldn't have halloood.

Q. Then you said: "Look out, Tom?"

A. Yes.

Q. That is the way you said it? Now, didn't you shout to Evans and say: "Look out?"

A. I told him to look out.

Q. And just as you shouted the man appeared at the door?

A. Yes, sir.

Q. With a lantern?

A. And we both halloood at about the same time.

Q. That is the man on the car yelled about the same time that you did?

A. Yes, sir.

Q. And notwithstanding that, he was struck. That is all.

CHARLES HOWARD ELSTON, plaintiff's witness, testified as follows:

Transcript, pages 101 to 106.

A. Well, we pulled into Wilsonia without any unusual delays at any of the stops along the line, and we got in there, I suppose, on time. I didn't look at my watch, but would judge that we did. And they stopped there some little time, quite a bit,—long enough, at least, that I got up and went out onto the platform between the two coaches to see what caused the delay. And I saw the conductor working the new switch that they had just placed that day. He was working it backward and forwards, to get it in working order so it would work easy to make the flying switch. And he worked there some little time after I went out on the platform, and finally got it working to suit him. They made the fly and run in ahead and coupled on, and was backing up to Oswego, and the conductor came through between the two coaches. I just stayed on the platform—it is only a little ways from Wilsonia to Oswego—and just before the train started, the conductor came through with his lantern. And after the train was in motion, a brakeman came through with what they call markers, or rear lights, supposed to be on the coach. And we had run just a little ways when they gave two bells to stop. Well, I went up the steps on the platform, and through the front coach, in back and up to the front platform, and the brakeman was just about the door, and I went past, and the conductor was stand-

ing on the platform. I followed the conductor down. I first asked him, I says, "Is somebody struck." And he says, "Yes." He walked right down the steps on the side that the boy was thrown off of, and I followed right behind him. And we went back down the track some little distance, and in walking along I got ahead of him. And I got down to the boy just ahead of him. He was right behind me, though. And found the boy laying there. And I examined him to see what shape he was in, and found the condition of his leg. It was cut off just below the knee, just a little ways, and ground up clear down to, or about the ankle joint—all mangled. And of course the first thing I thought of was to give aid to the boy.

Q. Was the boy a stranger to you?

A. He was, yes.

Q. At that time?

A. That was the first time I ever saw him that I know of. I asked some of the boys if they had anything to bind up the limb with. Nobody had anything. I started to take off my coat when the engineer, Mr. Craw, said that he would get a bell cord—a piece of the bell cord—if I remember right. I think it was him. At least they brought the cord, and I bound up the limb just above the knee as tight as I could, and stayed with the boy till he got to the hospital. In fact, I was with him from that time on till the operation was over and he was wheeled into the ward.

Q. Now, sir, you heard the signal to stop, did you?

A. I did.

Q. What was that? What kind of a signal?

A. Two bells.

Q. You heard that distinctly?

A. Yes, sir.

Q. And you knew something had happened then?

A. Yes, sir.

Q. Now, can you tell the jury, can you say positively, where that brakeman was at that time?

A. All I know is this: The brakeman passed through between the two coaches after the train was in motion, and just before it struck the boy; but a very little bit before, as I remember it.

Q. Now, you were between these two coaches?

A. I was between the two coaches. I was standing on the platform of what was the rear coach in going out from Portland.

Q. Let us get that. Now, we will say the engine was here. This is the front coach, and this is the rear one, backing this way. You were in here on the rear platform of this first coach back of the engine?

A. I was after they made the flying switch, and the engine run in on the main line and coupled on, I was on the front platform of the coach connecting with the engine.

Q. And the train was backing?

A. Yes, sir.

MR. FENTON: The front platform?

MR. LATOURETTE: This is the engine here, and this is what he calls the rear coach here. Now, they were backing up towards Oswego?

A. Yes, sir.

Q. And you were on the rear platform of this coach next the engine?

A. I was on the platform of the coach next the engine, standing on the lower step.

Q. As they were backing?

A. Yes.

Q. Now, the engineer passed by you with his two lanterns?

A. The brakeman.

Q. The brakeman, yes.

A. Yes.

Q. And you saw him go into this car?

A. I did.

Q. And you say shortly afterward that you heard this signal to stop?

A. Yes.

Q. Now, how far could that brakeman have got inside of that car?

A. Well, he couldn't have got, I don't think further than the center of the car.

Q. Further than the center of the car?

A. He couldn't have been further than that, I don't think, while I didn't see.

Q. When you went in after you heard that signal, you went into this coach through the door, and you saw the brakeman inside, didn't you?

A. Yes, sir.

Q. He hadn't got outside?

A. He was just at the other door, just about the other door, possible right by the stove.

Q. He hadn't got out of the car?

A. No, sir.

Q. Until after the signal to stop was given?

MR. FENTON: I want his answer there.

A. Well, of course, what I meant was this. When I got through the car, there was where the brakeman was. I don't say that he hadn't been on the platform, because I wasn't there to see; but when I went through the car, he was standing just about the door.

Q. You say that when he went into the car he wouldn't have had time to have got more than the center of the car, you think, before the signal was given?

A. No, I don't think he could have got more than to the center of the car.

Q. He couldn't have got out to the rear end?

A. No.

Transcript, pages 107 to 108.

Q. You heard that signal to stop plainly?

A. I did.

Q. Did you hear any bell rung in the engine?

A. Well, sir, that I couldn't say. I don't remember of hearing any bell at all. There was nothing that I remember of.

Q. Did you hear any whistle blown?

A. I did not.

Q. Were you in a position where you would have been likely to have heard a bell or a whistle?

A. I was in a position to have heard it, but at the same time I would not probably have noticed it, not thinking anything at all.

Q. Do you know whether they had any automatic bell or not on the train?

A. Automatic bell? I couldn't say whether there was on that engine or not. I couldn't say. I know they had one on one of the engines at Jefferson Street, but whether it was on that engine, I could not say. I don't know which engine it was on.

On cross examination he testified as follows:

Transcript, pages 116 to 118.

Q. But that coach was lighted up, was it?

A. Yes.

Q. Both coaches were lighted up?

A. Both coaches were lit up.

Q. And they had the usual glass windows on each side?

A. Yes, sir.

Q. Do you remember the door here whether it had a glass in the rear?

A. It did.

Q. And when you got through there the conductor, as you recollect it, was either in the door, or had just stepped through?

A. The conductor was standing on the platform just out of the door to the left.

Q. Oh, outside?

A. Just outside, to the left.

Q. Outside. Well, now, how was his back with reference to that door? The door is in the center, isn't it?

A. Yes.

Q. Do you remember how he stood there?

A. Well, sir, I do not.

Q. Was he facing towards the east or facing toward Oswego, or could you tell?

A. If I remember right, I think he was facing the east, but I could not say.

Q. That would be the direction where the boy was?

A. Yes.

Q. Well, now, when you went out there, had the boy already gone under the wheels, or had he just struck?

A. Why, the boy was struck before—I suppose the boy was struck before I left the platform between the two cars. The signal to stop was given before. That is the reason. I went up the steps and through the coach.

Transcript, page 119.

Q. When you got off there, who was first off on the ground?

A. The conductor.

Q. He had his lantern?

A. Yes.

Q. Was it lighted?

A. Yes, sir.

Q. Did he have it on his arm?

A. I think he was carrying it in his hand.

Q. And the brakeman had what you call the markers?

A. Yes, sir.

Q. And he had preceded you?

A. Yes.

Q. Did you see him when you came out?

A. He was just about the door when I went through.

Transcript, page 120.

Q. That train was moving back at the time, not over as fast as a man could walk?

A. Yes, it was under better headway than that.

Q. Five or six miles an hour, do you think?

A. Well, I should judge something like that.

Q. And you didn't hear any bell or whistle, but there might have been such a thing, and you not heard it?

A. Yes, sir, there might have been. I could not say whether there was or not.

Q. Like a man sitting in a room, and a clock would strike, and he might not hear it?

A. Yes, that is the idea, exactly.

Q. Unless his attention was particularly directed to it, why, he might not hear it.

A. That is true.

ARCHIE WORTHINGTON, plaintiff's witness, testified as follows:

Transcript, pages 128 to 130.

Q. Now, just tell the jury what the first thing was that you noticed, and what you saw and heard at the time of the accident.

A. Well, the first thing I heard was the signal for the train to stop; and, well, before that, before the signal, I seen the conductor, Mr. Keyzer, come through the coach. He had a lantern in his hand. He stepped to the door, and just as he opened the door and stepped on the platform he says, Look out! Look out! And at that why he stopped the train—give a signal to stop the train. Well, I jumped up. I knew there was something or other had stopped the coach. He said something about it being too bad, too bad! Something to that effect. At that I got off the coach and went on down, and saw the boy. He was over the bank. There was an embankment and he had some way or other rolled over the bank after the train had run him over. When I got there he was sitting up, and I think it was Mr. Elston was tying his leg up with rope or something.

Q. Which side of the train were you on, the river side or the other side?

A. I was on the river side.

Q. And the conductor came right there; and you was sitting here facing the back end, and he came through and opened the door?

A. Yes, sir.

Q. Now, how long after he had opened that door was it that he halloed?

A. Just as soon as he got on the platform he says, Look out! Look out! At that he—

Q. Did he halloo in a frightened sort of way—shout to them?

A. Well he halloood pretty loud, yes.

Q. Did he appear to be excited?

A. Well, I don't know as he appeared to be—

Q. Just tell the jury about his manner.

A. Well, as near as I can recollect he halloood fairly loud for him to get out of the way, I suppose. He says Look out! Look out! At that he reached up and pulled the string and stopped it. And then I—of course I got up and as I went out—started to go out—why he said something or other about it was too bad, or something or another of that kind. I don't just remember what it was he said, but I think that was what it was.

Transcript, pages 131 to 132.

Q. Where was this brakeman?

A. Well, I never seen the brakeman at all.

Q. You didn't see the brakeman?

A. Not that I remember, seeing the brakeman at all. If I did I never noticed.

Q. The brakeman had not got along there, you are quite sure, when he pulled that bell?

A. No, the brakeman had not.

Q. Of course, after that there was some excitement I presume?

A. Oh, yes.

Q. Now, did that train make any—how was it about the noise—whether the train made any noise or not—did you notice.

A. You mean whistle?

Q. No. I mean the train itself.

A. Well, I don't—I suppose it did some. I never paid any particular attention.

Q. You didn't notice.

A. No I didn't notice.

Q. Well, sir, did you hear the bell ring?

A. I did not.

Q. Or the whistle sound?

A. No, sir.

Q. Would you have heard—were you in a position so you probably would have heard?

A. Well, I could not particularly say about that because I was not paying much attention. The way it was—

On cross examination he testified as follows:

Transcript, pages 134 to 137.

Questions by Mr. Fenton.

Just a few questions, Mr. Worthington. As I understand you, you were going from Portland to Oswego?

A. Yes, sir.

Q. And when you got to Wilsonia the train made this switch?

A. Yes, sir.

Q. And turned the engine around on the other side?

A. Yes, sir.

Q. And you were sitting in this coach, two or three seats from the back end of it, facing towards Oswego?

A. From the front end, that was, going towards

Oswego. I was sitting two or three seats from the end that struck the boy.

Q. Yes, I understand; and on the west side of the car?

A. And on the east side of the car.

Q. On the river side.

A. Yes, sir.

Q. And you saw the conductor come through with his lantern, and you saw him go outside and call out to somebody—you didn't know who it was?

A. No, sir.

Q. Look out?

A. Yes. Just as he opened the door he stepped out and says, Look out! Look out!

Q. And then what did he do?

A. He pulled the string.

Q. Now, where did he get that string?

A. It is right up over his head, about that far, and he reached up—

Q. And that string sounded—when that string was caught what happened?

A. Why, there was two—he pulled—there was two whistles or whatever it is to stop the train.

Q. Now, then, how long would you say it was from the time he pulled the rope until the train actually stopped—I mean now in time?

A. Well, I could not say just how long it was in time.

Q. About how long? Suppose you had your watch, now, and were thinking—About how long does it seem to have been to you?

A. Oh, I could not say. It stopped right immediately. It ran, I should judge, about forty or fifty feet.

Q. That is to say, after the whistle was given, the bell to stop—it ran forty or fifty feet?

A. Yes, sir, something like that.

Q. And did you get up out of your seat and go out on to the rear platform?

A. Yes, sir.

Q. And had the conductor gone down the steps?

A. As I first got up he was standing in the door, I believe, and then he got down and went on.

Q. Was the door open at the time you first saw the conductor in the door?

A. Yes, sir.

Q. Had it—do you know if the door was open as they were backing?

A. No, I think not. I think as the conductor came through with his lantern he opened the door.

Q. And did it swing back,—fasten?

A. Well, I don't remember that—whether it did or not.

Q. But he stepped clear out on the platform and called to somebody?

A. Yes, just as he stepped out on the platform he said, Look out! Look out!

Q. Now, you don't know where the boy was at that time?

A. No, I do not.

Q. These coaches were lighted, were they?

A. Yes, sir.

Q. And they had glass windows on both sides?

A. Yes, sir.

Q. And this door had a glass window?

A. Yes.

Q. And will you say that train was backing at the rate of four or five miles an hour?

A. Well, I could not say positively, but I think it was traveling a fairly good lick.

Q. Stopped within fifty feet.

A. Yes, something of the sort.

It will be seen from the foregoing testimony that plaintiff and his friend Emmett saw the lights of the train, and Emmett saw the lights shining through the panel of the rear door. Neither Evans nor Emmett heard any whistle or bell ringing, but they both admit that they were not paying much attention, being engrossed at the time in catching the train. The other witnesses did not hear the whistle blown or the bell rung, but they admit that they were not paying any attention. Evans testified that he saw no one on the rear end of the train, but all the other witnesses testified that Conductor Keyzer was there. The only conflict of testimony as to this fact is to how long Conductor Keyzer had been on the rear platform with his lantern before Evans was struck.

H. N. MOONEY, fireman on the train, testified as follows:

Transcript, pages 274 to 277.

A. Well, we arrived at Wilsonia on time, and it

was necessary for us to make a drop of the train at Wilsonia. We dropped the engine up what is the main line now—it was the new line at that time—and let the coaches up the old main line, which is passing track now. We let them run by about—I don't know just how far they did go by, but in the clear anyway. As long as it was in the clear, that was all that was necessary. It might have been one car and might have been two. Of course, at the time I didn't pay any particular attention. And we backed up and got on the other end of the train, of course, what was the rear end coming in, and we started up slowly. Of course, we would start slow—a small engine, two cars. We hadn't gone far until we got a couple of whistles to stop—communication whistles, two. We stopped at once. Just about the time we got stopped, why, I saw this man rolling down at the side of the track. He also hallooed, and we stopped right away. I got out of the cab and went down there. I asked him what was the matter, and he didn't seem to say very much. He seemed to be all out of wind. I could see his foot hanging up on the briars there. So I rushed back up to the cab, and got a bell-cord we had there—not a bell-cord really, but it was a small cord we had back of the seat box. And the time I got back there, why, there were several fellows there—I don't recognize who they was now—and corded his leg up. I don't know who did the cording, but I helped. There were several there doing the work.

Q. Who gave the signal to stop, and from what part?

A. Why, I don't know anything about that. I suppose the conductor did.

Q. What part of the train did it come from, or did you know? Could you tell?

A. I don't know anything about that. Just got communication whistle—two whistles.

Q. That signal was communicated by what means? By a bell cord?

A. That is a signal cord operated by the air. It blowed a little whistle in the cab.

Q. And then about how far do you think that train moved after you received that signal?

A. Well, I don't suppose it went more than probably 30 feet.

Q. Do you know the length of those coaches—about what they were?

A. About 55 feet.

Q. How many coaches did you have in that train?

A. We had two.

Q. And what size engine did you have?

A. We had a 16x24; the smallest size we have got on the road here.

Q. How was that engine fired: In what way? What fuel did you use?

A. We used fuel oil.

Q. I will ask you whether or not the headlight on that engine was burning?

A. The headlight, no, it was not burning. I had it covered.

Q. How?

A. I had the headlight covered.

Q. Just explain that.

A. Well, the headlight would be up against the coaches now; but the rear light was open—burning.

Q. What rear light was that?

A. That would be, when we were leaving Oswego, that would be our headlight then.

Q. It had headlight on each end?

A. Yes, sir. This engine runs both ways.

Q. Was that headlight burning?

A. Yes, sir.

Q. What kind of headlight was that?

A. Acetylene gas.

Q. How much of a light does it give on a dark night?

A. It gives a fairly good light.

Q. I will ask you to state to the jury, if you know, whether that headlight showed any reflection outside.

A. Yes, it does.

On being recalled he testified as follows:

Transcript, pages 304 to 305.

Mr. Mooney, what have you to say about whether that bell was ringing, and what kind of a bell it was, at and immediately after this accident occurred?

A. Well, it was ringing.

Q. What kind of a bell is it?

A. Well, it is an ordinary engine bell, I presume.

Q. Did you have anything to do with operating it, or who operates it?

A. Why, I do, excepting in a case of this kind, where he turned on the air—rings it automatically.

Q. What is your recollection as to when that bell started to ring and when it discontinued ringing?

A. He commenced ringing it as soon as we commenced switching, after we had pulled up at Wilsonia and let the passengers off.

Q. And how long did it continue ringing?

A. Until we got to Oswego.

F. T. CRAW, the engineer, testified as follows:
Transcript, pages 287 to 290.

Q. Then you moved your engine up, and coupled on?

A. Backed the engine past the coaches that were on the main line, until the engine was on the main line, and then headed the engine up on the coaches, coupled on the coaches.

Q. Who worked the switch?

A. The conductor watched the switch.

Q. Who was the conductor?

A. L. D. Keyzer.

Q. After he had worked the switch, did he throw it back again to get on and line up?

A. Yes.

Q. Then what happened?

A. He steps right onto the pilot, because it was

right there by him, rode up to the coaches on the pilot, on the train.

Q. Then where did he go?

A. He went inside of the car.

Q. How long had he been gone inside of the cars, would you say, before you got the signal? When did you get your signal to go ahead?

A. Now, to make it plainer, in making this drop, after the brakeman had cut the air, he climbs up onto the platform. That would be between the engine and the coaches, or it would be on the coach next to the engine, where he could break this connection after giving the cars a good start; then after giving them head, as we call it, he pulled the pin, the engine goes ahead, and runs up the main line in the clear; when he clears he sets the brake behind the cars; then the engine couples, then passed over the switch; throws the switch, steps on the pilot, and rides up till we catch the coaches. Then he goes on the inside of the cars, and he does the coupling up of the air and things necessary.

Q. After it is coupled up, who gives the signal to go ahead?

A. In this case, the brakeman.

Q. Had the conductor gone into the car before the brakeman began to couple up?

A. Yes. He got off the pilot as soon as he touched, went right up into the coaches.

Q. What did he have on his arm??

A. He always carried a lantern.

Q. White light?

A. Yes, sir.

Q. Standard lantern?

A. Standard lantern.

Q. Where was he going when the brakeman was coupling up the air?

A. He went inside the car and closed the door.

Q. After he had gone inside of the first coach, started on, and after the brakeman had coupled up, coupled the hose up, the brakeman had given you a signal to back up, how far did you move before you got a signal to stop? Two signals to stop?

A. Well, two or three cars, possibly.

Q. Quite a distance?

A. Yes.

Q. About what is the length of those cars. Do you know the length of them?

A. It cannot be far from fifty feet.

Q. So you think you moved about 100—you said two or three car-lengths?

A. Two or three car-lengths.

Q. 100 to 150 feet, you think you moved, before you got the stopping signal?

A. Yes, sir.

Q. Where did you get the stop signal?

A. From the coaches, the whistle was blown.

Q. Could you tell from which coach the signal came?

A. No, sir.

Q. Well, then, how soon after you got the signal to stop was it that you did stop?

A. Oh, at once.

Q. How far did the train move after you got the signal, could you tell?

A. It don't seem as if it could move 20 feet, under the conditions.

Q. Could you say whether it moved as much as 20 feet, or 30 or 40, or what would be your judgment now?

A. I would say between 20 and 25 feet.

Q. How did you stop the train?

A. With the air-brake.

Q. And what was the grade? Was it going up hill at that point or not?

A. It was up-grade.

On being recalled he testified as follows:
Transcript, pages 302 to 304.

Mr. Craw, I didn't ask you anything about the bell on that engine. I wish you would state to the jury what the fact is, if you recollect and know, as to the ringing of the bell while you were switching, or at any time before this accident.

A. The bell was ringing.

Q. Well, now, how does that bell operate?

A. It is an automatic arrangement; rings with compressed air.

Q. Who rings it?

A. It is on the engineer's side, as we term it.

Q. Who would have charge of the bell?

A. I would.

Q. What was the object—what is the object of

ringing the bell, and where would it begin to ring, and where would it discontinue ringing?

A. Our instructions are never to move without first ringing the bell.

Q. Now, when you came into Wilsonia from the north, did you stop after you started to switch?

A. Yes, sir.

Q. Stopped the train?

A. Yes, sir.

Q. Well, then, when you started up again, what was done with reference to the ringing of the bell?

A. Why, I started it at work—started the ringer.

Q. Now, let me ask you to explain to the jury the difference between an automatic engine bell, and the old cord and rope.

A. We also have a rope.

Q. Well, I want to know, when you start an automatic engine bell to ringing, whether it will ring until something is done?

A. Yes, sir, at all times.

Q. Just explain to these men how that works.

A. It is a little air-engine, that works the compressed air. When the air is turned onto the ringer, it rings the bell, and when it is turned off, it stops the bell.

Q. Where, in the operation of this train as it was at that time, was it proper to ring this bell, or to discontinue it? How continuously was that bell run up to the time of the accident?

A. Why, it was ringing before we started to

move, and all the time after, until we got to Oswego.

Q. Then, do I understand you as saying that it was ringing while the train stopped there where this accident occurred?

A. Yes, sir, all the time.

Q. Well, was it so that anybody could hear it that listened?

A. Pretty good bell. It is a pretty good bell, as I remember it.

Q. The ordinary engine bell for that purpose?

A. Yes, sir.

L. D. KEYZER, the conductor, testified as follows:

Transcript, pages 321 to 327.

Q. I wish you would explain now, in your own way, tell this jury how you came into Wilsonia, what you did up to the time of the accident, explaining fully without my asking you further questions, if you can.

A. We arrived at Wilsonia on time, about 10:34. On account of the company changing the line at Oswego—which is called the Willsburg cut-off—it was necessary to drop the coaches at Wilsonia and shove them up to the depot at Oswego, because we could not make the switch at Oswego, as we did heretofore. We made the drop at Wilsonia, and we backed the train over the trestle at Wilsonia, and the brakeman rode the rear end back over the trestle, and then came up forward and cut the hose. There is two hose—the air hose and signal hose, and you have got to turn four angle

cocks to do it. While he was backing up and working that hose, I worked the switch this way, to be at work properly, because it is always customary to work the switch before you make the fly, because if you don't you are liable to ditch the cars. There may be a gravel between, and if there is you cannot throw it, so it is customary to work the switch before. So the brakeman hallooed, and I gave him a lantern to come away. We dropped the cars something like 20 feet into the clear. I threw the switch up for the main line, give the engineer the signal to back up, we headed in on the coaches. I rode the pilot in. Coupled up to the train. Before they coupled up, I dropped off the pilot, jumped up the steps of the rear coach, and went through the train to the front platform. When he coupled up, and the air released, the brakeman gave a signal to come ahead. Of course, I could not see what he was doing—I was up ahead. We went ahead, I should judge, between four and five car-lengths, as near as I could estimate the distance. And in the shadow of the darkness I saw two men coming down the track, and they were running, and I called to them to look out for the cars, the train is backing up. And one of the men got off the track, and as he did, he spoke to his partner,—I didn't know who they were at that time—to get off the track; and his partner used some profane language, something like saying he would catch them anyway. But I saw he was not going to get off the track, and I reached up and stepped on the threshold of

the door—I had to reach the cord; it is about four inches higher than the platform, the threshold is, and it makes it easier to reach the cord. So I stepped on the floor and stepped on the threshold, and gave two jerks. That means stop at once. It blows a little whistle in the engine. And just before we stopped we caught this Mr. Evans right in the face, right here, struck him on the face with the corner of the car, and he did fall down outside, over the rail, and one pair of wheels went over his leg, because I could feel the jar of the cars as it went over. And I says to myself, "We have got somebody's leg." And we stopped in about 30 feet, I judge, 30 or 40 feet. And we got out as quick as we could. He was down in the brush. He jumped, of course, on account of the pain, he jumped like a chicken with his head off. We jumped down and picked him up. The fireman came down there, and Mr. Emmett was there. Somebody suggested a rope, so he would not bleed to death. Mr. Craw went into the engine and got a rope. We tied his leg up as tight as we could, and brought him into the coach. After backing up so the platform would be right opposite where Mr. Evans lay, we carried him in there, and in there I asked him what was the reason he was running—was somebody after him? I supposed somebody was chasing him, because I couldn't understand why they was running down the track that way, at such speed. And he says, "We were trying to catch the train at Wilsonia, supposing it was going

to leave from there." And I think I asked him if anybody informed him that the trains did not come back to Oswego any more. I says, "Who do you blame for this?" He says, "I don't blame anybody but myself." He says, "It is my own damn carelessness. Some more of my bad luck." But he used profane language in there.

Q. Now, Mr. Keyzer, at the time you went from the steps of the rear coach next to the pilot, the two coaches were coupled together?

A. Yes, sir.

Q. And you left the brakeman in the act of coupling up the air between the pilot and the rear coach?

A. Yes, sir.

Q. Then you went, as I understand, into the first coach?

A. Yes, sir.

Q. Through that into the second coach?

A. Yes, sir.

Q. Which would be the coach ahead?

A. Yes, sir.

Q. As you were backing up?

A. Yes, sir.

Q. Now, did you notice Mr. Elston? Are you acquainted with Mr. Elston?

A. Yes, sir.

Q. Do you remember seeing Mr. Elston in the rear coach?

A. On the front platform of the rear coach, between the cars.

Q. Oh, you saw him as you went through there?

A. Yes, sir.

Q. Where was he?

A. Standing to the right of the door, on the platform

Q. Between the two cars?

A. Between the two cars.

Q. Well, now, at that time—what did you do when you passed him there? Where were you going?

A. Going up to the front end, the front platform.

Q. When you say front platform, you mean the one that is nearest to Oswego?

A. Yes, sir.

Q. As you were intending to back up?

A. Yes, sir.

Q. Now, what was your object in going up there?

A. Simply to be on the front end before backing the train, is all.

Q. Did you go onto that platform before you began to back that train?

A. Yes, sir.

Q. What did you have on your arm, if anything?

A. A lantern, white lantern.

Q. When you say white lantern, what do you mean by that?

A. Regular signal lamp which railroad men carry; company lamp.

Q. Was it lighted?

A. Yes, sir.

Q. What kind of a light does it give?

A. Fairly good light.

Q. Now, then, something has been said in the testimony here, and in statement of counsel about marker lights. I wish you would tell the jury what marker lights are for, and who handles them, and when they are to be put onto the train in those circumstances.

A. Marker lights is green and red light, combination light. They are about this tall, and weigh ten or fifteen pounds apiece, and they are on the rear of the train, passenger and freight trains, to indicate the rear of the train. The red light is on the rear one, to avoid trains from running into it. And that is all marker lights are used for.

Q. I will ask you to state to the jury whether or not those marker lights are intended to be on a car that is backing, or whether they are intended to be on a car that goes ahead.

A. They are intended to be on a car that goes ahead. That is what they are for.

Q. If I understand you, they are lights between stations?

A. They are lights between stations, yes.

Q. They are red behind and green in front?

A. Red behind always; green in front and green to the side.

Q. Suppose those marker lights had been on and an employee had seen them, that was familiar

with the company's rules and management, had seen those marker lights on there, and had been south, in this instance, we will say, towards Oswego, from the train, and marker lights had been up, what would that employee have understood by those marker lights, with reference to which way that train was going to go?

A. Why, I should think he would understand that it was leaving town.

Q. Going to Portland?

A. Going away from the place, yes.

Q. And if the lights in those circumstances had been back—if the train has been backed with the lights in that position from the employee, the employee would be deceived, would he?

A. He would be deceived in that case, yes, sir.

Q. I will ask you to state, if you know, what object there is in having a man on the rear of a car with a light when the train is backing. Does it have any relation to crossings, or yards, or anything of that kind?

A. Not to my knowledge.

Q. That was the rule, or rather that was the method by which you were to move the train backwards?

A. In switching or making up cars, I don't think it is necessary.

Q. But after you get done switching, though, you are supposed to be on the rear of the car with a lamp?

A. It is proper to be on the front end, yes.

Transcript, pages 331 to 332.

Q. Now, Mr. Keyzer, I will ask you if you recollect hearing the bell on the engine on that evening at any time shortly before or during the accident? What is your recollection about that?

A. Yes, sir, the bell was ringing all the time, continually.

On cross examination he testified as follows:

Transcript, pages 332 to 336.

Q. Mr. Keyzer you say that you were out on the front end of the coach there before the train started?

A. Yes, sir.

Q. With your light?

A. Yes, sir.

Q. You are sure about that, eh?

A. Quite positive, yes, sir.

Q. And you are quite sure that you continued to remain there until after the boy was struck?

A. I had no occasion to go in again.

Q. Well, did you go in?

A. No, sir.

Q. How long a period of time elapsed between the time that you went out on the front end before the train started and the time when the train struck the boy? Now, how long a time was that?

A. It could not have been very long, because we only went four or five car-lengths. It could not

have been over a minute and a half—something like that.

Q. You are quite sure that you were standing out on the end of the coach there next to Oswego, with your light, while the train was going four or five car-lengths before it struck the boy?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. You don't think you could be mistaken about that?

A. I know—I am satisfied that I am not mistaken.

Q. And your lantern was burning brightly?

A. Brightly, sir.

Q. That was your duty to do?

A. That was your duty, to be there.

Q. You did your duty?

A. Naturally would.

Q. When Mr. Worthington said that you had just reached the door and opened it, and stepped one foot out there on the platform when he heard you halloo, he is mistaken about that, is he?

A. He must be mistaken; must be mistaken; because one cannot see out of the darkness. The minute you come out of a lighted car you don't see nothing. You must be out there a minute before you can see anything, out of a lighted room, on account of the darkness.

Q. You saw Evans coming?

A. Yes.

Q. How far was he away on the track?

A. Not over 20 or 25 feet—something like that—because you couldn't distinguish anything, on account of the darkness, until the rays of the windowlight fell on the track; then you could see. Then you wouldn't be positive it was a man.

Q. You are quite sure, then, that you saw Evans 20 or 25 feet away?

A. 20 or 25 feet from the rear end.

Q. How far away was he when you halloooed to him to look out?

A. He couldn't have been over fifteen feet—something like that—because I was not positive it was anybody when I first saw the shadow.

Q. If he heard you halloo fifteen feet away, he ought to have got off, with that train running four to six miles an hour?

A. Mr. Emmett got off. I didn't understand why Mr. Evans didn't get off. That is what puzzled me, when I saw he was not going to move to get off, so then I pulled the bell.

Q. Emmett was behind Evans?

A. Emmett was a short distance behind, not very far.

Q. About 10 or 15 feet?

A. I don't think he was that far.

Q. Now, isn't it a fact that you came out there, and stepped out onto that platform holding the door here in one hand—just stepped out there and flashed your light out there, and that you saw Emmett instead of Evans, and that the car had

just instantly struck Evans as you stepped out? Now, isn't that the fact?

A. No, sir.

Q. You are sure you saw the two of them?

A. I saw both of them, yes, sir.

Q. The first was at least 15 feet away?

A. I don't think he was that far.

Q. You said that, didn't you?

A. I thought you meant separate from each other. From the rear end?

Q. No, I say from you—from the car.

A. At least 15 feet from the car, yes, sir; and he was looking down at the track—he was not looking at the train. He was looking down at the track, and was not looking at the train at all—just hammering it along—for fear he would fall down.

Q. Could he see the track?

A. I guess he saw the track all right, because he was watching his feet so he would not fall. It wouldn't have made any difference if the train had been afire, he wouldn't have seen it.

Q. You think if you had been in Evans' place you would have had ample time, after the conductor came out there, to have got away before the train hit you?

A. I am satisfied I would, yes, sir.

Q. And you swear positively that you was on the back platform?

A. I swear positively that I was on the back platform.

Q. On the front platform of that back coach when the train started to move on?

A. Yes, sir.

Q. With your light?

A. Yes, sir.

Q. And that the train had gone three or four car-lengths before it hit the boy?

A. Three or four car-lengths before it hit the boy.

Examination by the court.

Q. Mr. Keyzer, did you get out on the back platform before the train started to move, that the train was coupled on?

A. Yes, sir.

Q. You were out there before it started to move at all.

A. Yes, sir.

Q. Who coupled the engine onto the car?

A. The brakeman coupled the engine onto the car, and then coupled the car. There's two hose to couple, and four angle-cocks to turn. And while he was doing that, I was walking through the train to get to the front end.

Q. You got out there before the train started to move.

A. Yes, sir.

Q. With your light?

A. Yes, sir, white light.

N. P. SCRUGGS, the brakeman, testified as follows:

Transcript, pages 345 to 347.

Q. Let me ask you—did or did not the conductor have time enough, during the time that you were doing this coupling, to walk through both coaches and get onto the south end of that coach?

A. Yes, sir, he had plenty of time to do it; and I didn't give him a signal to go ahead the moment I cut the angles in but I waited until I heard the air released.

Q. What do you mean by that?

A. You see, when I rode the cars through into the clear, then I set the air on those two coaches, and that locked the wheels.

Q. Who would release the air?

A. The engineer, after I cut these hose, then he would release that from the engine. I waited till I heard that released. We have a little retainer, that we can hear whistle through the coach just when it is released. Then I gave the signal to go ahead.

Q. After you gave the signal to go ahead, did the train start?

A. Yes, sir.

Q. Then, what did you do?

A. Then I got up on the platform and took my markers down, which were still on.

Q. Where were these markers?

A. They were on the north end of the train then.

Q. Next to the pilot?

A. Yes, sir, next to the engine.

Q. You reached up to the end of the coach and took down a marker there, and then to the other side and took down another marker?

A. Yes, sir.

Q. What were those markers? What lights?

A. They were ordinary lamp-lights, but they were in a green and red globe.

Q. Were they lighted?

A. They were lighted, both of them.

Q. What were they for?

A. Well, they are to indicate the rear end of the train.

Q. What did you do then, after you took your markers down?

A. Then I started through the train to the other end.

Q. And did you get through to the other end before the signal to stop was given?

A. I got about the middle of the train, that is, between the two cars, when the signal was given, and I was possibly inside just a little ways when the air released.

Q. Of the second coach?

A. Yes, sir.

Q. That is of the rear coach?

A. That is the rear coach going towards Oswego.

Q. And when you got in the rear coach, before that signal to stop, I understand—who gave that signal, do you know?

A. No, sir.

Q. That signal to stop?

A. No, sir, I do not know who gave it.

Q. You didn't give it?

A. No, sir.

Q. Was the conductor in the car at that time, or was he out on the platform?

A. No, sir, he was out ahead of me. I had walked the one car, and was on the front platform of the rear car, when that signal was given.

Transcript, pages 348 to 349.

Q. Now, I will ask you to tell the jury whether you recollect anything about an engine bell on that engine that evening; what kind of a bell it was, and whether it was ringing from the time you got to Wilsonia until you got to Oswego.

A. Well, you know the engine bell is a large—about that size; ordinary engine bell; and it was ringing.

Q. Is it automatic or pull?

A. It has an automatic ringer on it, and it had also the old rope—the cord.

Q. Who manipulates the bell?

A. Well, I am not familiar with that part about it. I know the cord runs clear around on both sides.

Q. It is operated from the cab on the end?

A. Yes, sir, it is operated from the cab.

Q. Did the engine have a head-light on each end?

A. Yes, sir.

Q. What was done with the headlight next to the coach, after you started back?

A. They pulled the blind down over it. It was always down after I made the coupling. They nearly always left it there for me to see.

Q. Were those coaches lighted.

A. Yes.

Q. Now, I will ask you if the train made any noise in going south there, going up that little grade?

A. Well, yes. You never saw a train running that didn't make some noise, and especially in starting, like that—always do. There is more or less noise from the engine.

The foregoing testimony shows conclusively that every precaution was taken by the men in charge of the train to carefully handle the same while it was backing up towards Oswego. Lights were burning in the coaches. The conductor reached the rear end of the train, with a lantern on his arm, as soon as he could and was on the rear end when the trains started to back up, according to his testimony, and was, according to plaintiff's witnesses, on the rear end before plaintiff was struck.

It will be noticed that plaintiff's witnesses testified that they did not hear the bell ringing or the whistle blown, but admit that they saw the lights, and admit that they were not paying much attention; while defendant's witnesses, the fireman, conductor and engineer, testify positively, and without being shaken on cross examination in any particu-

lar, that the automatic bell was ringing from the time the train started until the accident happened. As to the effect of negative testimony such as given by plaintiff's witnesses, the court's attention is called to the case of *Rich v. Chicago, M. & St. P. Ry. Co.*, 149 Federal 79, where Judge Adams, speaking for the Eighth Circuit, in discussing the effect of negative testimony similar to the above, at page 82 said:

“In these circumstances the evidence under consideration was purely of a negative character and does not command itself to common intelligence or common experience as of any value. The witnesses may not have heard any warning given and yet it may have been given. The value of such evidence depends upon the existence of facts showing the likelihood that the warning would not have been given if the witnesses did not hear it. Such facts are absent in this case and we are left with the bald statement that the witnesses did not hear the warning as the only evidence that it was not given. They lived close to the yard and, as common experience teaches, had doubtless become so accustomed to the constantly ringing bells and sounding whistles as to be totally indifferent to them. As against this kind of evidence there is the positive testimony, unchallenged as to credibility, of the engineer and fireman who were at work on the engine in question, and two others who stood near by and in front of it as it was moving eastwardly, that the bell on the engine was constantly ringing as it was being backed eastwardly that

night. This evidence afforded by the two men whose duty it was to ring the bell, and by two others who actually saw the engine and noted its operations is positive and unequivocal in its character. The testimony of plaintiff's witnesses on the other hand, was of such a character, and attended by such circumstances as to be entirely true without affording any evidence of the fact sought to be established. This court has heretofore decided that in circumstances of the kind just disclosed there is no real conflict of evidence.

"In the case of *Chicago, etc. Ry. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65, speaking by Judge Van Devanter, the court said:

"'But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence.'

"In the case of *Baltimore & O. R. Co. v. Baldwin* (C. C. A.) 144 Fed. 53, the Circuit Court of Appeals for the Sixth Circuit examined the question now under consideration and announced its conclusion in the following words:

"'The result must be that purely negative testimony is not substantive, and amounts at most to nothing more than a mere scintilla.'

"To the same effect are the following cases: *Stitt v. Huidekoper*, 17 Wall. 384, 21 L. Ed.

644; *Horn v. Baltimore & O. R. Co.*, 4 C. C. A. 346, 54 Fed. 301; *Hubbard v. Boston & Albany Railroad*, 159 Mass. 320, 34 N. E. 459; *Culhane v. New York Central & H. R. R. Co.*, 60 N. Y. 133, 137. In the last-mentioned case, the Court of Appeals of New York had facts before it quite apposite to those now before us and said concerning them as follows:

“It is proved by the positive oath of the two individuals on the engine—one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. * * * As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere ‘I did not hear’ is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact.’

“While the foregoing rule is a valuable one to prevent speculative and unwarranted verdicts and should be fearlessly applied in appropriate cases, no liberty should be taken by

the trial judge under its supposed protection to weigh the force or value of evidence which is substantially contradictory. Where 'Circumstances attending the failure to notice an occurrence are such as afford reasonable ground to believe that if the occurrence had happened it would have been noticed by the witness, the failure to notice it may be and frequently is some evidence that it did not occur and should go to the jury for its consideration;' but when, as in this case, the failure to notice an occurrence is attended by no facts or circumstances tending to show that the witnesses would likely have noticed it if it had occurred, it should never be availed of to excuse an unwarrantable verdict. There was no evidence to support the fourth specification of negligence, namely, that the defendant failed to maintain a lookout to warn the decedent of the approach of the engine."

See also *Hunt v. N. P. Ry. Co.*, 196 Fed. 180-187, and 23 Am. & Eng. Ann. Cases 1912-B, foot note page 1133.

From the testimony in this case it is very hard to see how two men could reasonably differ as to the defendant having exercised the utmost care in handling this train.

While negligence is ordinarily a question of fact for the jury to determine, nevertheless in this case, assuming plaintiff was a licensee, it is respectfully submitted that the evidence is clear, convincing and conclusive that defendant did not violate any

duty owing to plaintiff as a licensee. And in instructing the jury the trial court clearly recognized how far from negligent the defendant was, when it said, page 370, transcript:

“And I come all the more satisfactorily to this decision because of the testimony that has been developed by the defendant in showing that it did exercise very great care in the movement of that train at that point, and that there was not negligence in the movement of the train upon the part of the defendant that would render it liable.”

WAS PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW?

It was not intended to take up so much of the court's time in discussing questions not properly raised by the record, but we deemed it necessary to answer plaintiff's contentions.

Plaintiff clearly cannot recover in this case, if guilty of contributory negligence, although defendant was negligent in failing to provide a light or suitable warning. It is sufficient to refer to the authorities under point 5 and to quote from the opinion of this court in the case of *N. P. Ry. Co. v. Jones*, 144 Fed. 47, where the court, speaking through Judge Gilbert, at page 49, said:

“Assuming that the evidence which went to the jury proves that the railroad company was negligent in not discovering the presence of the defendant in error on its track, what shall

be said of the evidence of the contributory negligence of the defendant in error? A general license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself. If the negligence of the defendant in error was one of the proximate causes of the injury which he sustained, if it directly contributed to the unfortunate result, he cannot recover, even though the negligence of the plaintiff in error contributed to it; and the rule is the same whether the injured person be a trespasser on the railroad track or a licensee. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 66 Fed. 115, 13 C. C. A. 364, 371, 28 L. R. A. 181; *Felton v. Aubrey*, 74 Fed. 350, 360, 20 C. C. A. 436; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; *Louisville & N. Ry. Co. v. McClish*, 115 Fed. 268, 273, 53 C. C. A. 60; *King v. Illinois Central Rr. Co.*, 114 Fed. 855, 862, 52 C. C. A. 489; *Missouri Pacific Railroad Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, 645."

And as stated in point 3, a railroad track is notice of danger and imposes upon the traveler or person using it, whether he be a licensee, or a trespasser, the duty of exercising the highest degree of care. He takes the risks subject to its concom-

itant perils. This principle is ably set forth and discussed in the case of *Garlich v. N. P. Ry. Co.*, 131 Fed. 837, where the court for the Eighth Circuit, speaking through Judge Lochren, at page 839, said:

“The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and that when a person goes upon such track, or so near as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm. And no reliance on the exercise of care by persons in control of the movement of trains or engines will excuse any lack of the exercise of such care by persons going upon such tracks. If the use of these senses is interfered with by obstructions or by noises, ordinary reasonable care calls for proportionally increased vigilance. *Blount v. Grand Trunk Ry. Co.*, 61 Fed. 375, 9 C. C. A. 526; *Pyle v. Clark*, 79 Fed. 744; 25 C. C. A. 190; *C. St. P. M. & O. Ry. Co. v. Rossow*, 117 Fed. 491, 54 C. C. A. 313; *C. & N. W. Ry. Co. v. Andrews* (C. C. A.) 130 Fed. 65.”

See also *N. P. Ry. Co. v. Jones*, 144 Fed. 47-50.

And as stated in point 4, it is the duty of one approaching a railroad track, or one using it, to stop, look and listen, and to ascertain his position and the circumstances surrounding his position, and a failure to exercise the highest degree of care imposed by reason of the conditions and circum-

stances into which he has brought himself, is negligence. This principle is ably illustrated in the case of *Railroad Co. v. Houston*, 95 U. S. 697, where the court, speaking through Mr. Justice Field, at page 702, said:

“And she was at the time on the private right of way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company’s employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure.

Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation.”

See, also, the case of *Morgan v. N. P. Ry. Co.*, 196 Fed. 449, 9th Circuit, decided May 20, 1912, where the court, at page 453, said:

“One who at any time voluntarily places himself in such a dangerous place as between the rails of a railroad is certainly chargeable by the law with the duty of looking and listening for trains that may be coming from either direction, which duty was greatly enhanced on the occasion in question, when, according to the evidence, the night was very dark and a strong wind was blowing. In a similar case before this court a few years ago (*Northern Pacific Railway Co. v. Jones*, 144 Fed. 47, 75 C. C. A. 205, we said:

“‘A general license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself. If the negligence of the defendant in error was one of the proximate causes of the injury which he sustained, if it directly contributed to the unfortunate result,

he cannot recover even though the negligence of the plaintiff in error contributed to it; and the rule is the same whether the injured person be a trespasser on the railroad track or a licensee.'

"Many cases are there referred to, to which reference need not be again here made."

It might be noted in passing that this case was one where the person injured assumed that the train which struck him was going down another track, just as in this case, plaintiff assumed the train would pull out from Wilsonia to Portland.

It is admitted that plaintiff and his friend Emmett intended to go to Oswego to catch the train to Portland, and in fact did start towards that point to take the train. (Transcript, pages 23 and 24, testimony of Thomas Evans.) The ticket read "Oswego and return." It is also admitted *that plaintiff and Emmett saw the lights of the train while standing at Wilsonia, and heard it switching.* They had no watch but thought it was getting ready to leave. They rushed up one of the paths from the foundry, used by the workmen of the Oswego Iron Works, to the right of way, and without investigating, turned and hurried north between the rails towards Wilsonia. It is admitted that plaintiff and Emmett did not stop to investigate at all, but assumed that the train was about to pull out towards Portland. The course taken by them was, as stated in the complaint, *convenient*

to catch the train. Without investigating, stopping, looking or listening, and knowing the train was at Wilsonia, giving plaintiff any view of the testimony you can, plaintiff and Emmett ran and trotted from the barn near the foundary, four hundred feet up a hill, then on to the right of way of defendant, and then down between the rails three hundred and fifty or three hundred and seventy feet to a point where the accident occurred. These are all admitted facts and the following testimony clearly shows that plaintiff was injured by his own carelessness and want of care.

THOMAS EVANS, the plaintiff, on direct examination testified as follows:

Transcript, pages 21 to 24.

MR. FENTON: As I understand, Mr. Latourette, he bought a ticket to Oswego and return.

MR. LATOURETTE: Yes, this is the half he had.

MR. FENTON: Oswego was his station he got on and off.

Q. Now, what did you do that evening with anybody?

A. Well, we went coon hunting that evening.

Q. Who?

A. Me and Pete Emmett and the Worthington boys.

Q. Coon hunting?

A. Yes, sir.

Q. Around up there in that neighborhood?

A. Yes, sir; up there about two miles.

Q. How far from Oswego?

A. About two miles, I believe.

Q. Up on the lake there?

A. No, I believe it was above the lake.

Q. Above the lake. Now, what time did you come back, Mr. Evans, to take the train?

A. Well, we left—the boys were still hunting when we left, and we left about 10 o'clock.

Q. What train did you aim to take to go back to Portland?

A. The 10:45.

Q. Now, you say you had been up there before?

A. Yes, sir, several times.

Q. And whenever you went up there, just tell the jury what you observed about the way the train made that flying switch so they will understand.

A. Well, every time I went up there before they always went to the station of Oswego, and then went on a little further south and switched. And they did that night when I went up; but while I was up there—I suppose it was the first train that was ever switched—they stopped at Wilsonia before they got to Oswego and switched there.

Q. Now, is that the way they did it on the day that you went up?

A. No, sir; they went past Oswego the day I went up.

Q. Well, that is what I say.

A. Yes, sir.

Q. Now, you went up about 4 o'clock?

A. Yes, sir.

Q. And they made the flying switch at Oswego?

A. Yes, sir, at Oswego, south of the station.

Q. That is, right near the station there?

A. Well, just a little ways.

Q. And when you came back to—this Emmett, did he live in Oswego?

A. Yes, sir.

Q. Your friend Emmett?

A. Yes, sir.

Q. He was a young man living there?

A. Yes, sir.

Q. And when you came back, what station did you intend to take the train from?

A. We intended to take it at Oswego.

Q. You intended to come back by way of Oswego?

A. Yes, sir.

Q. And did you start to go up to Oswego?

A. Yes, sir, that is where we started to.

Q. To take the train?

A. Yes, sir.

Q. What time of the evening was that?

A. Well, that was—we didn't know the exact time, but we knew we didn't have much time to get the train.

Q. Did you have any watch with you?

A. No, sir, I didn't.

Q. Did your friend Emmett have any watch?

A. No, sir, I don't believe he did.

Q. Well, now, from where you went up to the

railroad track, could you see the station of Oswego and Wilsonia both?

A. Yes, sir.

Q. That is to say, it was open view there?

A. Yes, sir.

Q. And this Wilsonia is on that line of road, is it?

A. Yes, sir.

Q. How is it situated with regard to Oswego—which direction is it from Oswego?

A. Why, it is north.

Q. And about what distance?

A. About—I measured it one time—1300 feet.

Transcript, pages 27 to 30.

Q. Now, describe to the jury how that train appeared to you when you saw it standing there.

A. Why, it was headed toward Portland—the train was.

Q. What could you see?

A. I could see the side lights and the engine there. Everything looked like it was headed toward Portland.

Q. And how close was it to the time, as far as you were able to judge, when it would start to go?

A. Well, we thought it had already been to Oswego.

Q. Now, then, what did you do from that time, when you went across this bridge on to the track, just tell the jury what you did, and what you saw, and what occurred. Go ahead.

A. Well, we came right up on the track, and

went right up the track, till it met me there and knocked me off.

MR. FENTON: I didn't hear.

A. We went up the track until the train hit me.

Q. Did you run?

A. No, sir, we started to run, and we was coming up the hill there; we had been running from the barn, and we was pretty well out of wind at that time.

Q. You started to run?

A. Yes, sir, we wasn't running at the time it hit me.

Q. How fast were you going when the train hit you?

A. As fast as I could walk.

Q. As fast as you could walk?

A. Yes, sir.

Q. Now, did you hear any bell rung?

A. No, sir.

Q. What?

A. No, sir.

Q. Did you hear any whistle?

A. None at all.

Q. Well, was there any bell rung or any whistle sounded on that train?

A. No sir, there was not.

Q. On that occasion.

Recess until 2 P. M.

THOMAS EVANS resumes the stand.

Direct examination continued.

Q. Mr. Evans, what kind of a night was it?

A. Well, it was rather dark.

Q. Was it raining?

A. No, sir.

Q. Cloudy?

A. Yes, it was cloudy and dark.

Q. What was the date of that?

A. The 25th of September.

Q. At about what hour?

A. I don't know the exact time but it was along about 10:45.

Q. In the evening?

A. Yes, sir.

Q. What amount of noise, if anything, was that train making? Did you hear anything?

A. Never heard a thing.

Q. What was the country there? Was it level or hilly?

A. Why, it was practically level.

Q. What was the road bed as to being level or otherwise?

A. It was level.

Q. Now, as I understand you had come up from below, or from the south or from the east of the track?

A. Yes, sir.

Q. How does the track run—what direction?

A. North and south.

Q. Pretty near north and south?

A. Yes, sir.

Q. And you had come from which side?

A. From the east side.

Q. What part of your person did the train strike?

A. What is the question?

Q. Where did it hit you—the train?

A. Why, it hit me in the face and breast.

Q. What part of the train hit you?

A. The back end when it was backing up.

Q. Well, what part of the end hit you? Just point out to the jury where it hit you and how it hit you?

A. Why, it hit me in the face, in the nose, and in the breast and knocked me back.

Q. Well, what happened then after the train hit you?

A. It run over me.

Q. Knocked you down?

A. Yes, it knocked me down when it hit me.

Q. How did you fall?

A. I fell on my face.

Q. You fell on your face?

A. Yes, sir.

Q. Did it turn you around?

A. Yes, sir, it certainly did.

Transcript, pages 35 and 36.

Q. Now, then, for what purpose were you going down the track?

A. Why, to get on the train to go to Portland.

Q. Now, you say you saw the train standing there?

A. Yes, sir, and I thought it was at Wilsonia.

Q. At Wilsonia station?

A. Yes, sir, that is where I thought it was.

Q. It was standing at that station, was it?

A. That is where I thought it was.

Q. Well, did you see it?

A. Yes, sir, I could see it.

Q. Do you know where the station was?

A. Just about, yes, sir.

Q. And could you see that the train stood there?

A. Yes, sir.

Q. And was it standing still?

A. Standing still when we saw it.

Q. Now, did you intend by going down that track to take the train, that particular train, the 10:45 train, back to Portland?

A. Yes, I intended to take it.

Q. From Wilsonia station?

A. Yes, sir.

Q. And that was a station between Oswego and Portland?

A. Yes, sir.

Q. On the defendant's line of road?

On cross examination he testified as follows:

Transcript, pages 37 to 39.

Q. Well, then, you had been to Oswego three or four times recently before this?

A. Yes, sir.

Q. Well, then, you were quite well acquainted with the station, Oswego, were you not?

A. Yes, sir.

Q. And the surrounding country.

A. Yes, sir.

Q. And the track between Oswego and Wilsonia?

A. Yes, sir.

Q. Now, Oswego, has been a station there for a great many years, hasn't it?

A. Why, for quite a while. I don't remember.

Q. How long has Wilsonia been a station before this accident?

A. I couldn't swear to that.

Q. Well, about how long?

A. I don't remember when it was put there, but it was there that summer.

Q. Yes, but you never got on or off at Wilsonia before in your life, did you?

A. No, sir.

Q. You always went to Oswego and got off, and you always got on at Oswego when you wanted to come back?

A. Yes, sir.

Q. And you never had been at the station of Wilsonia except to pass through it? You had never been at that station except to pass through it on the train, had you?

A. No, sir.

Q. Now, where were you coming from on that evening when you came up towards the right of way?

A. When we come from the right of way?

Q. When you came up from the east side of the

track, as you now say in your testimony, where were you coming from?

A. I was coming from the barn where the iron works keep their horses.

Q. Now, where is that with reference to Oswego?

A. That is a little northeast of Oswego.

Q. How far away from the station?

A. Why, it is about—I don't know the exact distance how far it is. It is not very far.

Q. A quarter of a mile?

A. No, I don't believe it is that far.

Q. An eighth of a mile?

A. Not any more than an eighth of a mile.

Q. Down under the hill, isn't it?

A. Yes, sir.

Transcript, pages 42 to 52.

Q. Don't you know that it was put in there by these people themselves for their own convenience to get onto the right of way, to go up to Oswego, and that you simply went up the hill, you both went up the hill onto the right of way, and got between the rails intending to go to Oswego?

A. No, sir. I intended to go to Wilsonia.

Q. But you were going to take the train at Oswego, weren't you.

A. No, sir, not when I come up on the track, I didn't intend to.

Q. Well, but before you got in sight of the cars, before you got over the hill, up onto the right of way, you expected to go to Oswego, didn't you, to get your train?

A. Before ever I seen the train at Wilsonia, I did.

Q. Yes, before you saw the train which you thought was at Wilsonia, you were started for Oswego station, weren't you?

A. We seen it before we started.

Q. I know you saw it, but before you saw the train it was in your mind—before you got to the right of way, before you got up the hill, you were started to Oswego, weren't you?

A. We seen the train when we was down by the barn.

Q. How far away?

A. Well, I don't know just how far it is from the barn to Wilsonia.

Q. Well, now, just about how far?

A. I should judge about one-eighth of a mile.

Q. About an eighth of a mile.

A. I don't think it is over that.

Q. That would be between six and seven hundred feet, wouldn't it?

A. Yes, sir, something—I believe it was a little further than that.

Q. Well, was it as much as 300 yards, do you think, from the barn up to Wilsonia?

A. From the barn to Wilsonia?

Q. Yes.

A. Something like that.

Q. Now, when you were at the barn intending to get ready to start to Portland, you saw the train at Wilsonia?

A. Yes, sir.

Q. What was it doing?

A. Standing there.

Q. Standing still?

A. Yes, sir.

Q. You knew it was at Wilsonia?

A. Yes, sir.

Q. And you knew that before you left the barn?

A. Yes, sir.

Q. Now, what did you see that made you know it was there?

A. Well, we could see the side lights in the coaches.

Q. There was no hill, or trees, or anything to obstruct your view?

A. No, sir.

Q. You saw it there at Wilsonia, standing still?

A. Yes, sir.

Q. While you were walking from that point all the way up?

A. No, sir. We seen it there, and went right on up the hill.

Q. Now, let me ask you this question, Mr. Evans. From the time you left the barn and walked in that path up to the right of way, could you see the train all the time?

A. No, sir.

Q. What kept you from seeing it?

A. Well, it is on the side hill there, and we never paid much attention to it. We was trying to get up there on the track.

Q. Now, what was there to prevent you from seeing the train at Wilsonia station just the same as you saw it from this barn?

A. Well, the further you went up the hill, you couldn't see the side lights.

Q. What obstructed your view?

A. Why, when we got up even with the end of it, you couldn't see the side lights.

Q. But you could see the train, couldn't you?

A. No, sir, it was dark.

Q. But you had seen it?

A. Yes, sir.

Q. And knew it was there?

A. Yes, sir. I knew it was there.

Q. And you couldn't see the body of the train when you got past where you could see the side lights?

A. No, we couldn't see the train after we got by, no, sir.

Q. Well, you saw that train when you walked a distance of about 600 feet, until you got past the side of the car, didn't you?

A. Yes, we could see it.

Q. And you could see all the way until you got near the end, behind it?

A. Yes, sir. When we got behind it we couldn't see it.

Q. And the thing that made you see it was the side lights on the coach?

A. Yes.

Q. And you saw that until you got between the rails?

A. Yes, sir.

Q. From the time you left the barn until you got between the rails, that train was in your eye all the time?

A. No, I wouldn't swear it was in my eye all the time I was going along.

Q. Well, you could see it if you had looked?

A. Well, maybe I could.

Q. Well, is that the fact?

A. No, I don't believe a fellow could, going along there, see it all the time.

Q. Most of the time you could see it?

A. No, sir, it is trees along there.

Q. Well, now, Mr. Evans, when you got over into the right of way, you got into a little cut, didn't you?

A. Yes, sir, at that time.

Q. There was quite a ridge on the east side of that track, isn't there, at that point?

A. Yes, sir.

Q. How high is that ridge would you say, above the level of the rails? As high as a man?

A. You mean?

Q. On the east side, as you came up the hill, isn't there quite a raise there, embankment, thrown off to one side?

A. Yes, sir, it is quite—

Q. You had to come down onto the grade between the rails, didn't you?

A. No, it is a side—tips right off from the side.

Q. The bank slopes down?

A. Not from the track. It slopes from the bank.

Q. Well then, you climbed up, didn't you?

A. Yes, sir.

Q. And when you got up there, when you got up to the point at the top of this grade, how far were you from the rails down there?

A. The rails below?

Q. Yes.

A. We come up on the rails. We wasn't above the rails at all.

Q. Is it lower—all the ground lower on the east side than the track itself?

A. Yes, sir.

Q. There is no embankment on the east side there at all?

A. No, sir.

Q. Perfectly level, or rather inclines down the hill—is that it?

A. It was, right along there where it hit me.

Q. But when you went up and went onto the track, did you climb up an embankment, or did you go down an embankment to get to the track.

A. Well, it was up hill to the track, if I remember right, right along.

Q. Well, when you first got up on top, did you see the train?

A. No, sir.

Q. How far away were you from the track when you undertook to look? Did you look after you got up there within a distance, I mean, close to the track, did you look to see where your train was that you had seen all the time?

A. Why, it was standing still; the last time I ever seen that train it was standing still.

Q. Well, now, did you run up the hill?

A. Yes, sir, we run up the hill.

Q. And did you run across this little culvert?

A. Yes, sir.

Q. And did you turn and run straight towards Portland?

A. No, sir, we was pretty well petered out when we got on top.

Q. Yes, you were tired?

A. Yes.

Q. But you did run up the hill, and run on the track between the rails?

A. Not all the way up the hill.

Q. You were running when you got onto the rails, weren't you.

A. No, sir.

Q. You still saw the train when you got between the rails, didn't you?

A. No, sir, we never seen it.

Q. Couldn't see it?

A. No, sir.

Q. Well, when did you first see it, now, after you got between the rails, before you were hurt?

A. Before I was hurt?

Q. Yes.

A. I never seen it at all before I was hurt after I got on the track.

Q. Well now, how far was it from where you first entered the track and got between the rails down to where Wilsonia was? About 600 feet you said, didn't you?

A. Where we got on the track?

Q. Yes.

A. No, sir, I didn't.

Q. How far did you say.

A. I should judge it was about, from where that trail comes on the track, about 800 feet.

Q. To Wilsonia?

A. Yes, sir.

Q. Well, now, how far had you gone from where you got on the track between the rails after you crossed this little culvert, how far had you gone towards the train before it struck you?

A. Why, I couldn't say, but we hadn't gone very far before it struck.

Q. Well, about how far?

A. Well, I couldn't say.

Q. A hundred yards, do you think?

A. No, sir, I don't think we went that far.

Q. One hundred feet?

A. Something like that. We hadn't went just a little ways.

Q. Who was ahead, you or the other man?

A. I was.

Q. What was his name?

A. His name was Emmett.

Q. How far ahead of him were you?

A. I should judge about 10 or 15 feet, I suppose.

Q. Did you, either of you, run after you struck the grade?

A. After we got on top?

Q. After you got on the track.

A. Why, we were trotting along part of the time.

Q. That is, you trotted towards what you thought was Wilsonia?

A. Yes, sir, we wasn't running.

Q. I know, but what was the reason you were trotting?

A. Why, we wanted to get the train to go to Portland.

Q. Didn't you know that it was your impression that that train was just pulling out from Wilsonia, and you were trying to catch it?

A. Pulling out to go to Portland?

Q. Yes.

A. No, sir, it was not. It was standing still.

Q. I say, wasn't that your idea at the time?

A. No, sir, it was not.

Q. You thought it was just leaving, and you could run and catch it—now, isn't that the fact?

A. No, sir, that is not a fact.

Q. You thought it was standing there?

A. Yes, sir, I did.

Q. And you didn't see the train approach you at all?

A. No, sir, or I wouldn't let it hit me.

Q. You didn't hear it approach you?

A. No, sir.

Q. And you didn't hear your companion call to you to look out for the train?

A. No, sir.

Q. You didn't hear the conductor or anybody else call from the train to look out for it?

A. No, sir, I did not.

Q. You didn't see it coming back.

A. No, sir, I did not.

Q. And yet you are willing to swear to this jury that you looked, you didn't see any brakeman or anybody else on the rear end of that train, or any light there?

A. It was none there.

Q. How do you know, if you couldn't see the train, and didn't see it?

A. Well, because it just knocked me off the side.

Q. I know, but if you looked and couldn't see the train, and couldn't hear it, and didn't know it was there, how could you say whether there was a brakeman or a light on the rear of that train?

A. There was no light there or a man could see it.

Q. You said there was no conductor, no brakeman, or no man there.

A. I couldn't say there was any there—never seen any.

Q. You say there was no one there, but you mean to say you didn't see anybody?

A. I didn't see nothing at all.

Q. As a matter of fact, did you look?

A. Yes, I had my head up like any man would.

Q. Where did this train strike you in the face?

A. Right in the nose, right there.

Q. Did it do any damage?

A. It skinned it, yes, sir.

Q. Any scar there now?

A. I don't believe so.

Transcript, pages 55 to 57.

Q. And when you left the barn, you started to take the train, as you say, at Wilsonia, and you got onto the track, and the train was still standing so far as you know?

A. Yes, sir.

Q. And you couldn't see the side lights, but you knew the train was there, and you never saw it and you never heard it until it ran the 700 feet? Now, is that true?

A. Yes, sir, I never heard it nor saw it, or I would have got off the track.

Q. Now, what were you doing?

A. I was going down the track.

Q. What did you have in your hands—anything?

A. Never had a thing.

Q. You had good eye-sight, didn't you?

A. Yes, sir, I had.

Q. You were an active young man?

A. Yes, sir, I was.

Q. And you ran part of the distance on the track?

A. No, sir, we never ran, after we got on the track. We went on a little trot, not to say run.

Q. Well, you made a turkey trot, as you say, on the track?

A. Yes, sir; but I was not running when that train hit me.

Q. I know, you stopped just before the train hit you, just into a walk. I understand that.

A. No I didn't stop just before it hit me. We walked a ways before it hit me, but how far I wouldn't say.

Q. Did the other man—what is his name?

A. Emmett.

Q. Did he trot or run?

A. He was behind me.

PETER JAMES EMMETT, plaintiff's witness, on direct examination testified as follows:

Q. When was it, about what time was it, that you left the barn with him to go to the station that evening?

A. Oh, about half past ten—10:35—somewhere along there.

Q. Did you have a watch?

A. No, I didn't have a watch.

Q. Just had to guess?

A. Just had to guess about that time.

Q. Now, in going from the barn to Wilsonia station, which way did you go?

A. Went right up past the old pump house, and up that walk.

Q. To what point?

A. To the railroad track there just below the depot.

Q. And then which way from there?

A. Went down the track.

Q. Well, which direction would that be?

A. North.

Q. Now, you say by that path. What path do you refer to?

A. The path that all the foundry boys goes to work on the trail that runs down to the foundry.

Transcript, pages 70 to 72.

Q. Now, you think it was about 10:30 or 10:35 that you and Mr. Evans started to go up to take the train?

A. About 10:30.

Q. And could you see any train before you got up to the railroad track?

A. Well, I heard it switching.

Q. You heard it whistle.

A. I heard it switching.

Q. Where was it then?

A. At Wilsonia.

Q. At Wilsonia station?

A. Yes, sir.

Q. And could you see some side lights down there on the train?

A. I don't know that I looked up to see any. I heard it, and I knew that it was there.

Q. Well, just describe to the jury now, what you did, and more particularly what Evans did from the time that he got onto the track, and what occurred. Tell the jury what happened.

A. Well, when we got onto the track he just went right down the track coming up from the foundry. We had been running, we was pretty tired, and just poking down the track, like a man would when he was tired; not thinking of the train backing up; thought it would be starting out the other way, and he just ran right into it—kind of trotted into it, as it was. I was a little behind him. He was a little better runner than I was—he was a little ahead of me.

MR. FENTON: That is, Evans trotted into it?

A. Yes, sir.

JUROR: Were you between the rails?

A. Yes, sir.

Q. Well now sir, what was the first thing you noticed?

A. The first thing I noticed?

Q. Yes, in regard to the train after you had got on the track.

A. When I got on the track?

Q. After you got on the track.

A. After I got on the track?

Q. Yes, when he was struck.

A. When he was struck. There was a man came to the door with a lantern just as the train struck him, and hallooed "Look out, look out."

Q. Just as the train struck him?

A. Just as the train struck him.

Q. Where did this man come from?

A. Just came right out of the coach.

Q. Out of what part of the coach?

A. The rear end, right out of the door.

Q. The end your mean, towards you?

A. Yes, sir.

Q. Towards Evans? Well now, which happened first—did the train strike Evans first, or did the man come out of the coach first?

A. There wasn't but very little difference. You could hardly tell.

Q. Just tell the jury what you saw about that just as near as you can.

A. Well, just about the time the train struck the boy, the man come to the door with a lantern, and he hallooed "Look out," and it just knocked the boy down, and it ran over his leg. And I crawled down to see where he went to. I never expected to see him alive.

JUROR: How far were you from the train then?

A. About eight or ten feet.

Q. Do you know who that was that had the lantern?

A. Well, I suppose it was the conductor.

Transcript, pages 73 to 74.

Q. You saw that afterwards, did you?

A. Just as the door opened I could see, when the train was coming, and it didn't any more than give me time to get off.

Q. Were you looking all the time as you were coming down there to see if there was any train coming, or in the way?

A. I don't know as I would have seen it if the door hadn't opened, myself.

Q. Was it pretty dark?

A. Fairly dark, yes.

Q. Now, was there any whistle or any bell rung there right before that accident?

A. Well, I didn't hear any myself.

Q. Well, were you in a position where you would have heard if it had been sounded?

A. I expect I would.

Q. Was there any signal of any kind given so as to warn Evans or yourself of the backing of that train?

A. Not that I know of?

Q. Any noise of the train running, or anything that you could hear?

A. Of course the train would make a little noise.

Q. Did you hear any noise?

A. I wasn't paying any attention to the noise particularly. I was expecting it was going the other way, and would start from Wilsonia.

Q. Was the wind blowing, do you know, that night?

A. No, I don't know.

Q. You say you and Evans had been running pretty fast?

A. Yes, sir.

On cross examination he testified as follows:

Transcript, pages 78 to 86.

Q. It is about the same distance, as I understand you, from the barn by way of that path to Oswego, as it was from the barn by way of that path to Wilsonia?

A. No, there is two paths. One runs from each depot to that foundry.

Q. Oh, then, there is a path that leads from this barn, that goes to Wilsonia?

A. Yes.

Q. At that time?

A. Yes, sir.

Q. And then there is another path that goes to Oswego?

A. Yes, sir.

Q. Now, which path did you and Evans take—the one that led to Oswego?

A. We took the one that led right up between Oswego and the—

Q. I understand, but that was the path that you would take to go to Oswego.

A. Well, yes.

Q. Now, why was it, Mr. Emmett, that you

took that path instead of taking the one that went to Wilsonia?

A. Well, we was on that path, and we would have had to go around back to the foundry to get on the other one, when we was on that one.

Q. In starting out from the barn, I understand you to say there are two ways to get to the track. One is to go to Wilsonia by one path?

A. Yes.

Q. And one to Oswego by another path?

A. Yes, sir.

Q. And you took the path that led to Oswego?

A. Yes, sir.

Q. Well, now, why did you take that path instead of the Wilsonia path?

A. Well, we would have had to went around down to the foundry, and didn't think about it at the time.

Q. Isn't this true, Mr. Emmett, that you both thought that you would go to Oswego and get on the train there?

A. Well, when we got up to the track?

Q. I mean when you left the barn.

A. When we left the barn.

Q. That was your idea?

A. That was the idea, yes, sir.

Q. To go to Oswego?

A. Yes, sir.

Q. Because you knew he had a return ticket from Oswego?

A. Yes, sir.

Q. Were you coming back to Portland?

A. I was coming to Portland, yes, sir.

Q. You hadn't gone out with him?

A. No, sir.

Q. You expected to go to Oswego and buy your ticket, and come in with him?

A. No, sir, they don't stay open.

Q. Well, you expected to get on the train at that point, at Oswego, when you left the barn?

A. When we left the barn.

Q. Now, when was it that you and Mr. Evans changed your mind and concluded to go to Wilsonia instead of to Oswego?

A. When we got up pretty near to the railroad track, going up that little bridge.

Q. When you got almost up to the railroad track, why, you say you had heard it switching, hadn't you?

A. Yes, sir.

Q. And you knew when it was switching that it was down towards Wilsonia, didn't you?

A. Yes, sir.

Q. And so did Mr. Evans know it? You talked about it, didn't you?

A. Yes.

Q. And when you got up pretty nearly to the track, you looked, and you saw the side lights in the coach?

A. No, sir, there was no side lights.

Q. You didn't see any lights at all?

A. No, sir.

Q. Mr. Evans said that he saw the side lights from the time he left the barn.

A. Well, there was lights in the window. There's no lights on the side.

Q. Well, I mean in the window.

A. Oh, in the window.

Q. That is what I mean by side lights. You saw there were side lights, or windows in the coach, and that there was light inside, didn't you?

A. Yes, sir.

Q. And you saw that from the time you left the barn?

A. Couldn't see it all the time. Never looked all the time.

Q. But you did see it before you went down onto the track?

A. Before we went onto the track?

Q. Yes.

A. I don't know as we did.

Q. You had heard it switching?

A. We heard the switching.

Q. You knew it was switching down at Wilsonia, didn't you?

A. Yes.

Q. Didn't you think where the train was going?

A. Well, switching down there a person would naturally think it was going to leave from there when it got switched.

Q. Now then, as a matter of fact, both you and Mr. Evans expected, after you got up there and saw that the train was down towards Wilsonia,

that you would have to run to catch it there, didn't you?

A. We expected we would have to run and get on it when it left Wilsonia.

Q. You thought that the train had left Oswego and was on its way to Portland, didn't you?

A. Well, I knew it was there.

Q. Well now, isn't it true that you both thought the train had left Oswego and gone to Portland—started on to Portland?

MR. LATOURETTE: We object to what Mr. Evans thought, unless Mr. Evans stated to him what his opinion was.

COURT: The two were together.

Q. Wasn't that the reason why you changed your course and didn't go up to Oswego, as you intended originally, and concluded to go the other way to Wilsonia, because you thought, both of you, that it had started on to Portland; had already been to Oswego, and was going back? Now, isn't that the fact?

A. What would be the difference if we got on at Oswego?

Q. Answer the question. Isn't that the fact?

A. We expected to get on there when it left Wilsonia, of course.

Q. I know, but you intended originally to go to Oswego; but when you got up there you saw it was down at the other place, and you thought it was going to go on; it had been to Oswego, you thought, and you wanted to catch it, didn't you?

A. Of course we wanted to catch it.

Q. Didn't you start to run to catch that train?

A. We had been running. He was ahead of me. He was a better runner than I was.

Q. You had heard it switching at Wilsonia before you got in sight of it?

A. Yes, sir.

Q. You supposed it had been at Oswego, and you would have to hurry to catch it?

A. We had to hurry, yes.

Q. You intended to catch the train? You thought it had already started?

A. It hadn't coupled up yet when we started to run down the track.

Q. Well now, when you saw the train, saw the side lights, and you were up on top there, and was going to step down onto the track, do you want to tell this jury that you walked there deliberately, with no idea of any hurry; that the train would wait for you, and that you would get on at Wilsonia; but didn't you hurry to get the train?

A. We hurried all we could, yes, sir.

Q. Didn't Mr. Evans hurry all he could?

A. I suppose he did.

Q. Didn't he outrun you, and wasn't he about 10 or 15 feet ahead of you when he was struck?

A. He was eight or ten feet ahead of me, yes, sir.

Q. You were both running at the time?

A. I don't know as he was running so fast. He was doing all he could to get there.

Q. And he was running?

A. I don't know as he was running.

Q. Weren't you running?

A. I was doing all I could.

Q. What was that? Running or walking?

A. You could call it running or trotting.

Q. I am not calling it. Was it running or what?

A. It was trotting as fast as a man could when he was out of wind.

Q. You had hurried from the time you first got up on top there, you hurried as fast as you could in the condition you both were, to get that train, supposing it was making its way to Portland?

A. Yes, sir.

Q. And you had no idea that it was going back to Oswego?

A. If I did, I wouldn't have went down there.

Q. Certainly. And neither one of you looked to see whether it was going to back?

A. Well—

Q. Now, isn't that true?

A. I wasn't watching the train. I was getting down there.

Q. Yes, you were not watching the train—you were trying to catch it?

A. I was trying to get down there, yes.

Q. How far was it from you when you got down on that track and started to run or trot down

towards Wilsonia, between the rails—was it down to Wilsonia?

A. How far?

Q. Yes.

A. Oh, about 800 feet, eight or nine hundred feet.

Q. And you intended to run all the way between the rails down to Wilsonia, 800 feet, to catch that train, did you?

A. Well, if we had time to run before it coupled up.

Q. And while you were running, all at once it came the other way?

A. Yes, sir.

Q. And caught this man. Now, didn't you know that that train was down there all the time, both of you?

A. I don't know about him knowing it. I knew it was there.

Q. You could see it when you got onto the track, couldn't you?

A. I never seen it. I knew it was there. I knew it hadn't gone.

Q. Well, did you look to see if it was there?

A. A man going that way wouldn't naturally.

Q. Couldn't you see the lights that were in that coach, through the glass door in the rear?

A. You could see the lights, yes.

Q. Couldn't you see the reflection from the side lights, it being a rather dark night?

A. I didn't notice it.

Q. But you could see it was lighted up to one side. Couldn't you see the reflection of the headlight from the engine?

A. No, sir.

Q. You didn't look to see whether it reflected at all or not, did you?

A. Well, a man looking down the track would naturally be looking.

Transcript, 89 to 92.

Q. Now, at the time you saw the train, when you got up there, you thought the train was just pulling out, didn't you, for Portland.

A. I thought it would, yes, sir.

Q. You thought it was just pulling out, and that is the reason you were hurrying?

A. It hadn't started yes, I didn't think.

Q. But you expected you would have to run to catch it?

A. To catch it.

Q. How far did you move from where you first got onto the track, or how far did Evans move from where he first got onto the track, between the rails, until he was struck, in feet? About how far down the track had you gone?

A. About how far down the track?

Q. Yes.

A. Not over 200 feet.

Q. Had you trotted all the way those 200 feet?

A. I had.

Q. You had?

A. Yes, sir.

Q. And you didn't catch him?

A. I was just a little ways behind him.

Q. He kept ahead of you about 10 feet?

A. About 10 feet.

Q. Did you notice the train backing up at all before he was struck?

A. Not until he was struck.

Q. Just before he was struck you noticed the train was coming?

A. Just about the time it struck him.

Q. How far away from you was it when you first saw the train approaching?

A. About 10 feet.

Q. You mean you were 10 feet from the rear end?

A. From the rear end.

Q. Don't you think you were 20 or 25 feet away?

A. I don't think it was.

Q. Are you certain about that?

A. I know I was not so very far.

Q. Well, weren't you as much as 20 or 25 feet away when you first saw the train coming? I mean, knew it was coming?

A. No, sir, I don't think I was.

Q. Did you call to him to get out of the way?

A. Just about the time it struck him, I called to him.

Q. What did you say?

A. I says: "Look out."

Q. Whom did you speak to?

A. Tom Evans.

Q. What did you call him?

A. I says: "Look out, Tom."

Q. Did you yell?

A. I halloood just about as I said it.

Q. You said, "Look out, Tom."

A. Yes, sir.

Q. Did you say it that way?

A. I suppose I did.

Q. You thought he was going to be run over, didn't you?

A. Just as the door opened there when I saw it was coming.

Q. When you called to him, you thought he was going to be run over anyway, didn't you?

A. Sure, or I wouldn't have halloood.

Q. Then you said: "Look out, Tom?"

A. Yes.

Q. That is the way you said it? Now, didn't you shout to Evans and say: "Look out?"

A. I told him to look out.

Q. And just as you shouted the man appeared at the door?

A. Yes, sir.

Q. With a lantern?

A. And we both halloood at about the same time?

Q. That is the man on the car yelled about the same time that you did?

A. Yes, sir.

Q. And notwithstanding that, he was struck. That is all.

L. D. KEYZER, defendant's witness, on direct examination testified as follows:

Transcript, pages 321 to 324.

Q. I wish you would explain now, in your own way, tell this jury how you came into Wilsonia, what you did up to the time of the accident, explaining fully without my asking you further questions, if you can.

A. We arrived at Wilsonia on time, about 10:34. On account of the company changing the line at Oswego—which is called the Willsburg cut-off—it was necessary to drop the coaches at Wilsonia and shove them up to the depot at Oswego, because we could not make the switch at Oswego, as we did heretofore. We made the drop at Wilsonia, and we backed the train over the trestle at Wilsonia, and the brakeman rode the rear end back over the trestle, and then came up forward and cut the hose. There is two hose—the air hose and signal hose, and you have got to turn four anglecocks to do it. While he was backing up and working that hose, I worked the switch this way, to be at work properly, because it is always customary to work the switch before you make the fly, because if you don't you are liable to ditch the cars. There may be a gravel between, and if there is you cannot throw it, so it is customary to work the switch before. So the brakeman hallooed, and I gave him a lantern to come away. We dropped the cars

something like 20 feet into the clear. I threw the switch up for the main line, give the engineer the signal to back up, we headed in on the coaches. I rode the pilot in. Coupled up the train. Before they coupled up, I dropped off the pilot, jumped upon the steps of the rear coach, and went through the train to the front platform. When he coupled up, and the air released, the brakeman gave a signal to come ahead. Of course, I could not see what he was doing—I was up ahead. We went ahead, I should judge, between four and five car-lengths, as near as I could estimate the distance. And in the shadow of the darkness I saw two men coming down the track, and they were running, and I called to them to look out for the cars, the train is backing up. And one of the men got off the track, and as he did, he spoke to his partner,—I didn't know who they were at that time—to get off the track; and his partner used some profane language, something like saying he would catch them anyway. But I saw he was not going to get off the track, and I reached up and stepped on the threshold of the door—I had to reach the cord; it is about four inches higher than the platform, the threshold is, and it makes it easier to reach the cord. So I stepped on the floor and stepped on the threshold, and gave two jerks. That means to stop at once. It blows a little whistle in the engine. And just before we stopped we caught this Mr. Evans right in the face, right here, struck him on the face with the corner of the car, and he did

fall down outside, over the rail, and one pair of wheels went over his leg, because I could feel the jar of the cars as it went over. And I says to myself, "We have got somebody's leg." And we stopped in about 30 feet, I judge 30 or 40 feet. And we got out as quick as we could. He was down in the brush. He jumped, of course, on account of the pain, he jumped like a chicken with his head off. We jumped down and picked him up. The fireman came down there and Mr. Emmett was there. Somebody suggested a rope, so he would not bleed to death. Mr. Craw went into the engine and got a rope. We tied his leg up as tight as we could, and brought him into the coach. After backing up so the platform would be right opposite where Mr. Evans lay, we carried him in there, and in there I asked him what was the reason he was running—was somebody chasing after him? I supposed somebody was chasing him, because I couldn't understand why they were running down the track that way, at such a speed. And he says, "We were trying to catch the train at Wilsonia, supposing it was going to leave from there." And I think I asked him if anybody informed him that the trains did not come back to Oswego any more. I says, "Who do you blame for this?" He says, "I don't blame anybody but myself." He says, "It is my own damn carelessness. Some more of my bad luck." But he used profane language in there.

F. S. CRAW, defendant's witness, on direct examination testified as follows:

Transcript, pages 291 to 292.

Q. Now, did you have or hear any conversation with Mr. Evans, when you first went down there or at any time after the accident, as to how it happened, or as to who was to blame?

A. I was there only a short time, perhaps less than two minutes. He was talking when I came in hearing, and I overheard a conversation something like that, in substance: "This has been an expensive trip for me here tonight. But," he says, "it is my own damn carelessness, and you boys ain't to blame."

Q. Now, who was present at the time you heard that conversation?

A. I know the fireman was there, and the conductor and the brakeman. They both had lights.

Q. Do you remember whether there was any one else there or not, any bystander or outsider, at the time of this conversation?

A. There were other parties there, but I don't know who, in the dark; I don't know.

Q. I will ask you if that was said while they were tying his limb or before?

A. While they was tying his limb.

J. M. COON, defendant's witness, on direct examination testified as follows:

Transcript, pages 311 to 312.

Q. Now, do you recall this young man Evans

being in the coach when you boarded the train, and entered the car at Oswego.

A. I think when I first saw him he was on the back platform of the rear coach. I don't think they had carried him into the coach yet. They had put him on there and brought him out to Oswego, and they waited there for a cot or something to put him on and bring him to town; and they put him on after he got there. But I wouldn't be sure whether he was in the coach or just on the platform when they got there.

Q. I want you to tell the jury what conversation, if any, you heard him—what you heard him say, in the presence of yourself, and I think the Conductor, Mr. Keyzer, or any one else, when you went into that coach on that evening, as you were starting to go on to Portland.

A. Well, I think the conversation he had with Mr. Keyzer was before we started to go to Portland, and while we was in Oswego, as near as I can remember.

Q. Who was Mr. Keyzer?

A. Mr. Keyzer was the conductor.

Q. Now, then, just state to the jury who was present at that conversation, and what was said.

A. Well, I couldn't tell who all was present, but I think the engineer and the fireman were there, and the conductor, and I don't know whether the brakeman was there or not; but there was people around there—I don't know all. But Mr. Keyzer was asking him questions about where he

was, where he lived, and about him, and if he blamed the trainmen. And he said, No, it was his own damn fault; he had no business running after the car. That is what I think, just the expression he used.

While it is true that where the facts, or the fair inferences to be drawn from the same, with respect to contributory negligence are doubtful, the case is one for the jury, there is a well recognized rule in the federal courts that when from the testimony it is clear and convincing that no two minds can differ as to contributory negligence of the plaintiff, the court, in the exercise of a sound judicial discretion, may direct the jury to return a verdict for the defendant. In fact it is its duty to do so. This rule is clearly stated by the authorities under point 6.

In the case of Northern Pacific Railway Company v. Jones, 144 Fed. 47, this court discussing this exception, and speaking through Judge Gilbert, at page 52 said:

“Where the facts, or the fair inferences to be drawn from the facts, with respect to contributory negligence are doubtful, the case is one for the jury; but where, from any proper view of the undisputed or established facts, the conclusion follows as a matter of law that the plaintiff cannot recover, it is the duty of the trial court to direct a verdict. Schofield v. Chicago & St. P. Ry. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Delaware, etc.

Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Warner v. B. & O. R. R., 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; Northern Pacific Railroad v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; District of Columbia v. Moulton, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237.”

This was a case of a licensee walking on the track between stations, and this case was later followed and affirmed in the case of Russell v. Oregon Short Line R. Co., 155 Fed. 22, where this court, speaking through Judge Hunt, at pages 25 and 26, said:

“It is unnecessary to discuss the rule dwelt upon by counsel that ordinarily questions of negligence are for consideration by the jury, guided by proper instructions by the court as to the principles of law by which the jury should be controlled. That rule is so firmly established that it may be regarded as elementary. But it is also thoroughly well settled that a case may be withdrawn from the jury altogether and a verdict directed for plaintiff or defendant, as may be proper, where there is no dispute in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set aside a verdict rendered in opposition to such evidence. Delaware, etc. Railroad v. Converse, 139 U. S. 472, 11 Sup. Ct. 569, 35 L. Ed. 213. In Schofield v. Chicago & St. Paul Railway Company, 114 U. S. 615, 5 Sup. Ct. 1125, 29

L. Ed. 224, Justice Blatchford, pronouncing the unanimous opinion of the Supreme Court, said:

“It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co. v. Munson*, 14 Wall, 442, 20 L. Ed. 867; *Pleasants v. Fant*, 22 Wall, 116, 22 L. Ed. 780; *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *Baylis v. Travelers' Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989.’”

This was a case of an employe and others driving a hand-car along the track towards an approaching train.

It will be noted that the cases cited in plaintiff's brief do not contradict this rule. In fact they affirm it. It is also well settled that the federal courts will not follow the “scintilla of evidence” doctrine as laid down by some state courts. The case of *Rich v. Chicago, etc. Ry. Co.*, 149 Fed. 79-83, quoted above, is determinative of this point. See also *Hart v. Northern Pacific Railway Co.*, 196

Fed. 180, 187, where the case of *Improvement Co. v. Munson*, 14 Wall. 442, 448, disapproving this "scintilla of evidence" doctrine, is approved and followed. At page 187, the court for the Eighth Circuit, speaking through Judge Adams, said:

"In the early case of *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867, that court distinctly disapproved of the 'scintilla doctrine', saying:

" 'But the recent decisions of high authority have established a more reasonable rule (than the scintilla rule) that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'

"In *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958, *Delaware, etc. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, *Elliott v. Chicago, Milwaukee & St. Paul Ry.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court affirmed the doctrine of the *Munson Case*, but no criterion was suggested for determining what evidence was of such 'conclusive character' as to warrant the summary action of the court in directing a verdict."

Not only have the various federal appellate courts and district courts adhered to and followed the ruling laid down in the *Jones case*, but the

United States Supreme Court has in numerous decisions laid down and adopted the rule that when the evidence given at the trial, with all the inferences which the jury could justly draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court in the exercise of a sound judicial discretion is not bound to submit the case to the jury, but may direct a verdict for the defendant. The cases quoted under point 6 fully support this rule, and it is sufficient to refer to the case of *Elliott v. Chicago, etc. Ry. Co.*, 150 U. S. 245, where the court, speaking through Mr. Justice Brewer, at page 246, said:

“It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago, Milwaukee & St. Paul Railroad*, 114 U. S. 615; *Delaware, Lackawanna &c. Railroad Co. v. Converse*, 139 U. S. 469; *Aerkfetz v. Humphreys*, 145 U. S. 418.”

Plaintiff knew the train was at Wilsonia. He had heard it switching and saw the side lights. He took a *convenient* way to catch the train which he imagined was pulling out for Portland. Without stopping to investigate the actual situation, and

assuming it was pulling out towards Portland, he rushed to defendant's right of way and then down between the rails three hundred and fifty or three hundred and seventy feet, without stopping once or paying any attention, being engrossed in "just hitting it along" to catch the train. It is inconceivable how one who was exercising any care at all, could have failed to hear or to see the train backing towards him. Under the record in this case there can be no dispute as to plaintiff's contributory negligence under any view that is taken of the testimony. Two persons could not reach a different conclusion, and a verdict returned by a jury against the defendant, under the testimony in this case, would clearly have to be set aside by the trial court. The only conflict of testimony, if it can be called a conflict, arose when plaintiff said he was looking ahead.

The case of *Hart v. Northern Pacific Ry. Co.*, 196 Fed. 180, is instructive on the question of what constitutes a substantial conflict of testimony to send a case to the jury, and with the case of *Northern Pacific Co. v. Jones*, 144 Fed. 47, is determinative of the question of plaintiff's contributive negligence as a matter of law.

At page 186 of the *Hart* case, Judge Adams speaking for the Eighth Circuit, said:

"So much for affirmative evidence of want of ordinary care. But there was more than this. The physical and uncontradicted facts are to

the same effect. He could not have looked or listened or otherwise made any use of his senses to discover the approach of the train behind him. If he had done so at any time after the train started from the Jamestown depot, he could not have avoided seeing or hearing it. It is inconceivable that he could have paid any attention to it as it approached nearer and nearer to him. If he had done so, he must have both seen and heard it. If, after seeing and hearing its close approach, he made no effort to avoid being run over by it, he certainly was not in the exercise of ordinary care. But we are here met with the contention that the steam which witness Dell testified about so obscured his view that, if he had looked, he could not have seen the approaching engine. Nine witnesses, including four whose credibility plaintiff vouches for, by calling them, and five others who were experienced in such matters and who stood at the time of the accident on the open platform of the yard office or just east of it, all testified that there was no cloud of steam or anything else which interfered with their perfect vision eastwardly even so far back as Jamestown depot. With this array of testimony directed to the very point and place of inquiry, the testimony of Dell who stood at the time between 300 and 400 feet west of the yard office, to the effect that some cloud of steam obscured his vision eastwardly, is not necessarily inconsistent with that of the other witnesses. One, at least, of the engines about the yards was located in a southwesterly direction from the yard office,

which, if Dell was correct in saying that the steam came from an engine blowing off, might have projected its steam across the line of his vision west of the yard office; and this would not have been inconsistent with the testimony of the other nine witnesses that there was no impediment to vision between the yard office where they stood, eastwardly to the depot at Jamestown. Whether this be so or not we do not think Dell's evidence creates such a substantial conflict with that of the other nine witnesses as warranted a submission of the issue of contributory negligence to the jury.

"In *Southern Pacific Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485, the Supreme Court, in passing upon a similar question to that now before us, said:

" 'There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law.'

"The Supreme Court had before that time in repeated cases held that the court might withdraw a case from the jury and direct a verdict for the plaintiff or the defendant where the evidence was undisputed, 'or of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

"In the early case of *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867,

that court distinctly disapproved of the "scintilla doctrine," saying:

" 'But the recent decisions of high authority have established a more reasonable rule (than the scintilla rule) that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'

"In *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958, *Delaware, etc. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, *Elliott v. Chicago, Milwaukee & St. Paul Ry.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court reaffirmed the doctrine of the *Munson Case*, but no criterion was suggested for determining what evidence was of such 'conclusive character' as to warrant the summary action of the court in directing a verdict. In view of that fact the *Pool Case* becomes peculiarly instructive. It is there said: Where the facts are 'undisputed or clearly preponderant' the question of negligence becomes one of law. We have heretofore in the cases of *Chicago & N. W. Ry. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65, *Pattillo v. Allen-West Commission Co.*, 65 C. C. A. 508, 131 Fed. 680, 686, followed the doctrine of the *Pool Case*, and held that under circumstances like those of the present case it was the duty of the trial court to treat the question involved as one of law and

not of fact. See to the same effect the very recent case of Chicago Junction Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. —, decided December 11, 1911, and also Mt. Adams etc. Inclined Ry. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463.

“Dell’s testimony, therefore, to the effect that his vision 300 or 400 feet west of the yard office when looking in the direction of the Jamestown depot was obscured by steam, constitutes no substantial contradiction to the testimony of the nine other witnesses that their vision at or east of the yard office was not obscured at all.”

See also 23 Am. & Eng. Ann. Cases 1912-B, foot note page 1133.

It is respectfully submitted that the testimony in this case shows conclusively that plaintiff was guilty of contributory negligence as a matter of law, in rushing carelessly down the track between the rails and into a train which he knew was at Wilsonia, and that the same comes clearly within the exception recognized by the authorities, and that under the doctrine laid down by this court in the Jones, Russell and Morgan cases, the trial court did not err in directing a verdict for the defendant, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

WM. D. FENTON

BEN C. DEY

KENNETH L. FENTON

Attorneys for Defendant in Error.

No. 2098

**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Plaintiff

vs.

TONY CURTZ, a minor by AGNES CURTZ,
his Guardian ad Litem,

Defendant

TRANSCRIPT OF RECORD

Upon Writ of Error from the United States Circuit
Court for the Western District of Washington,
Western Division

RECEIVED

JAN 29 1911

W. MONCKTON,
CLERK.

FILED

JAN 15 1912

No. _____

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Plaintiff

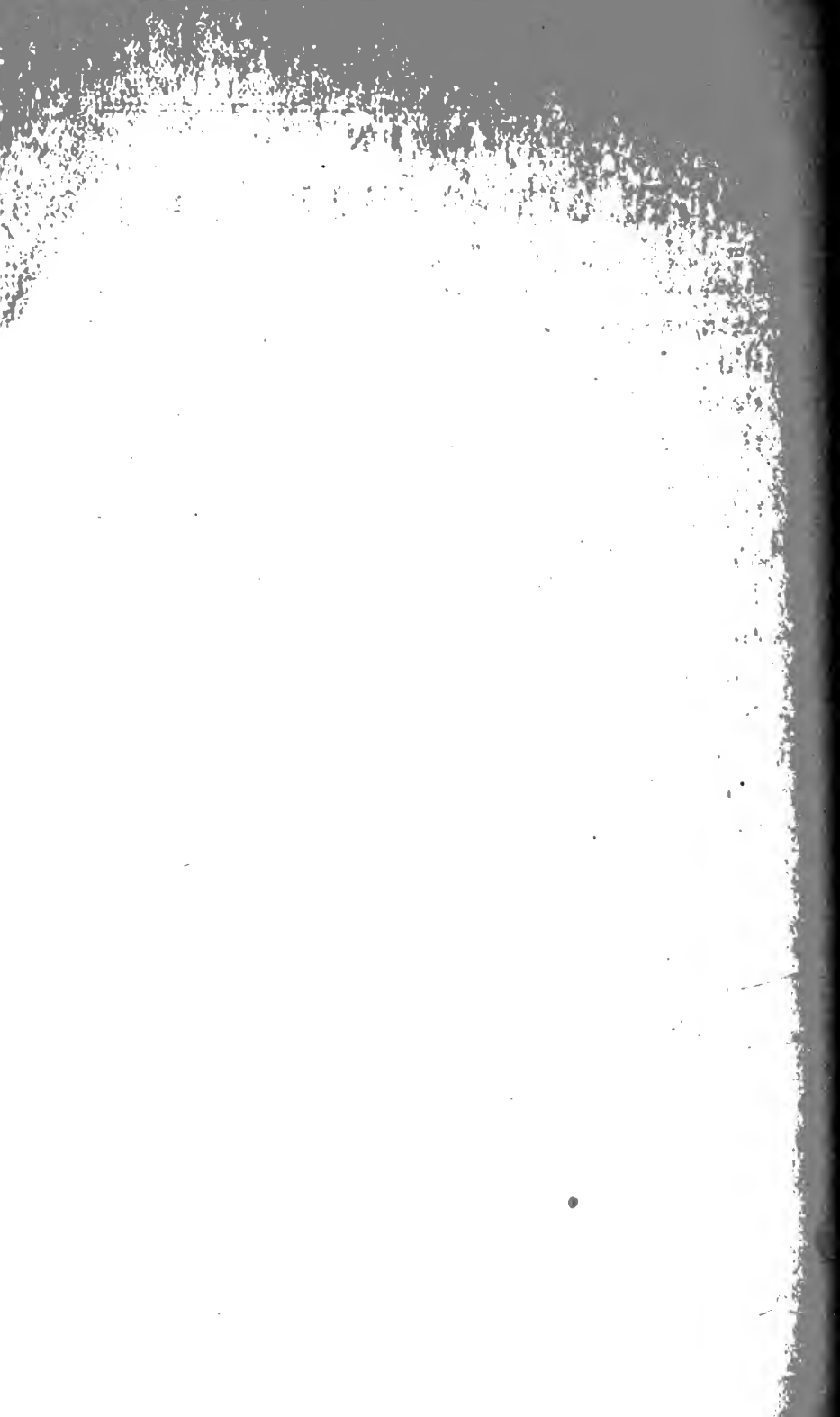
vs.

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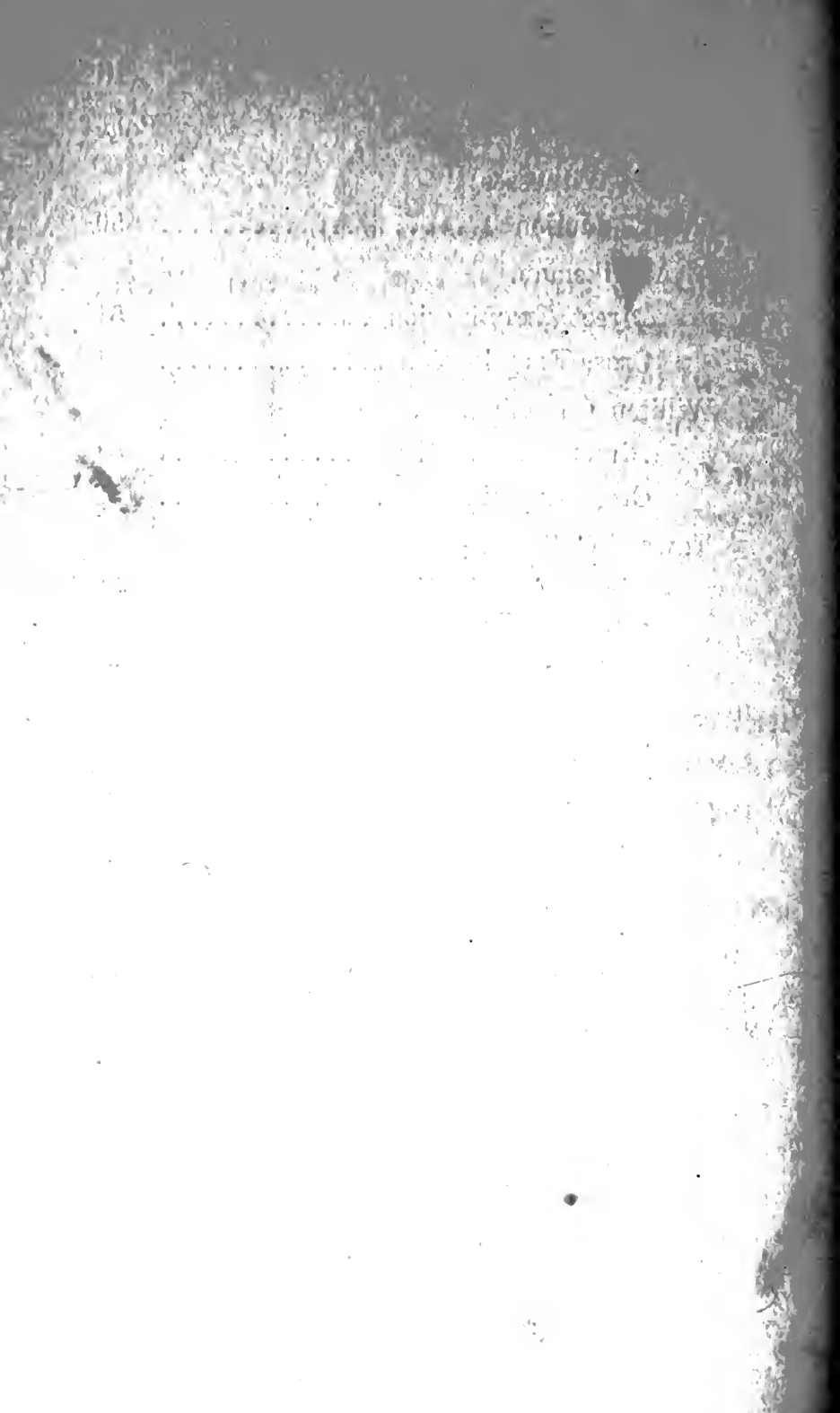


I N D E X

	Page
Answer	15
Assignments of Error	69
Bill of Exceptions	22
Bond on Removal	11
Bond on Appeal	76
Complaint	3
Citation	80
Clerk's Certificate	81
Judgment	21
Motion for Judgment Notwithstanding Verdict	18
Motion for New Trial	19
Notice of Removal	14
Order of Removal	13
Order Overruling Motion for Judgment, etc...	20
Order Extending Time to Make Bill of Excep- tions	20
Order Allowing Writ of Error	75
Order Settling Bill of Exceptions	68
Petition for Removal	9
Petition for Writ of Error	74
Reply	18
Stipulation as to Printing Transcript	2
Testimony:	
Plaintiff's Witnesses:	
Mrs. Curtz.	
Direct Examination	23
Recalled	49

	Index	Page
Tony Curtz.		
Direct Examination		24
Cross Examination		26
Maggie Slabb.		
Direct Examination		27
Cross Examination		29
Redirect Examination		30
Mark Maloney.		
Direct Examination		31
Cross Examination		33
Eddy Maloney.		
Direct Examination		34
Cross Examination		34
Edwin Wolfe.		
Direct Examination		35
Willie Therkilesen.		
Direct Examination		36
Cross Examination		37
J. P. Farley.		
Direct Examination		38
Cross Examination		39
F. L. Raymond.		
Direct Examination		39
Cross Examination		40
Redirect Examination		44
Mrs. Slabb.		
Direct Examination		49

Index	Page
Defendant's Witnesses:	
Defendant's Motion	50
A. A. Dikeman.	
Direct Examination	51
Cross Examination	51
William Cumming.	
Direct Examination	51
Cross Examination	52
Edward C. Trow.	
Direct Examination	53
Cross Examination	55
Recalled	59
Frank Housman.	
Direct Examination	56
W. J. Hughes.	
Direct Examination	57
J. W. Clark.	
Direct Examination	57
Cross Examination	58
Court's Instructions	59
Exceptions	65
Court's Ruling on Motion for New Trial	67
Verdict	20
Writ of Error, Petition for	74
Writ of Error, Bond on	76
Writ of Error, Order Allowing	75
Writ of Error (Copy of)	78



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Stipulation

It is hereby stipulated by the parties hereto that the Clerk of the above entitled Court in printing the record may omit the designation of the Court, the title of the case, verifications and endorsements except on the first page.

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Attorneys for Defendant.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT,

Western District of Washington

NOV 18, 1911.

JAMES C. DRAKE, Clerk.

By Albert P. Close, Deputy.”

Complaint

Plaintiff complains of the above named defendant and for his cause of action alleges, avers and states:

I.

That on or about the day of October, 1910, Agnes Curtz, was duly appointed guardian of the above named plaintiff Tony Curtz; that said plaintiff is an infant of the age of thirteen years and now resides in the City of Tacoma, Pierce County, Washington.

II.

That the defendant, Northern Pacific Railway Company, is a corporation organized and existing under the laws of the State of Wisconsin, and at the times hereinafter mentioned, owned and operated a railway line, and railway yards in the City of Tacoma, Pierce County, Washington.

III.

That on or about the 12th. day of September, 1908, said defendant owned and held on its switches in said Tacoma, and along on Dock Street near 11th. St., three or four empty cars and that said cars had recently been unloaded of wheat, and that there was more or less loose wheat lying on floors of said cars; that the said defendant customarily stored cars from which wheat had been unloaded on the track where said cars before mentioned were stored, and the fact that said defendant so stored said cars, and that said cars contained more or less loose wheat left in and lying on the floors of said cars, was well

known to a great many people, including men, women and children residing in said city; that the wheat left in said cars were uninjured and after being collected by sweeping the floors of said cars, found ready sale in said city for chicken feed; that this fact was well known to said defendant, at all times hereinafter mentioned.

IV.

That the place where said cars were stored was under a bridge about fifty feet high, running from the end of 11th. St. at the Perkins Building, in Tacoma towards the tide-flats and the mills and factories situated in said latter locality; that a dock, street and highway ran parallel to the tracks of said defendant along under said bridge by the place where said cars were stored; that said street was used by a multitude of people and a great number of teams; that said street led to ware-houses, to merchandise docks and to passenger docks situated near the section house under said 11th. St. bridge; that a portion of said street east of said railway tracks was planked right up to the said railway tracks and the cars were unloaded onto wagons customarily and usually at about the place where said cars were stored. That the dock where all excursion boats and the small gasoline craft came to said city and where private and public yachts discharged and received passengers was located within about 50 feet from the place where said cars were stored, and people, in going to and from said dock, passed by said storage track at all hours of the day and night; that

there were tracks and pathways used by a great number of people landing down the west bank of said right of way from said City of Tacoma and onto and across the tracks immediately west of said storage track and said pathways were used and employed by a great number of pedestrians in going down to said docks, warehouses, and into other parts of said yards and along said water front daily and hourly, said pathways being most accessible and easy of descent from said city, and that said pathways had been in use to the knowledge of said defendant for many years immediately preceding the times mentioned, all to the knowledge of said defendant.

That because of the loose wheat left in said cars as aforesaid, at said place, a great number of people, including boys of tender years, were at the times herein mentioned, and for a long time before, accustomed to boarding said cars each and every day and hour when they stood on said storage tracks, and sweep the said wheat thereon and remove it therefrom; that this was done to every car so switched in, and said defendant well knew the same to be a fact, and permitted and licensed and encouraged said people, including boys of tender years, to so enter said cars and sweep up and remove the wheat therefrom.

V.

That it was the duty of said defendant, because of the premises aforesaid, not to move or switch said cars from a standing position without first examin-

ing to see whether boys of tender years and immature years, judgment and discretion, were therein for the purpose of sweeping said wheat or observing others engaged in said work; and to warn children, if any were found thereon, away from said cars before switching the same or before moving the same from a stationary position; it was also the duty of said defendant, because of the premises aforesaid, and because of the dangers which were liable to arise in case said cars were switched without the knowledge of said children, and also because of the immature judgment and discretion of said children, the same would not be conscious of the dangers which might arise in case said cars were switched without the knowledge of said children, and also because of the immature judgment and discretion of said children, the same would not be conscious of the dangers which might arise in case cars were moved while they were within the same, and because said defendant had allowed, and encouraged and licensed said infants of immature judgment and discretion to frequent said storage tracks and to enter said cars and sweep the wheat therein and remove the wheat therefrom, for a long time prior to the dates mentioned herein; to keep said children away from said cars and from said yards and not allow them to get upon said cars for the purpose of sweeping said wheat or to be or remain in or about the immediate neighborhood of said cars, well knowing that said cars would not remain standing any great length of time, and also knowing that said infants,

because of their immature judgment and discretion and tender years were incapable of and did not appreciate the dangers of being in, about and upon said cars.

VI.

That the plaintiff, Tony Curtz, at the time hereinafter mentioned, to-wit: September 12, 1908, was about 11 years of age; that he was carelessly and negligently, invited, encouraged and permitted by defendant to board one of its said box cars so standing on said storage tracks containing loose wheat as aforesaid for the purpose of sweeping said wheat and observing sweep wheat in said cars; that said Tony Curtz was of immature judgment and discretion as to be totally unaware of any dangers connected with being in, on or about said cars and such immature condition was well known to said defendant at said time and place. That when plaintiff and the other boys were in said car the servants and employees of said defendant, knowing that said boys were in said car and in a dangerous position and knowing of the immaturity of said plaintiff and knowing that the car was about to be moved by the engine of said defendant and that such fact was unknown to said plaintiff and the other boys, negligently failed to warn plaintiff of his danger, and negligently and carelessly propelled a locomotive to which was attached some other cars, with great and unnecessary violence and force against the car in which plaintiff was standing, and thereby caused

the same to be moved suddenly and with great violence, by reason wherefor the said Tony Curtz plaintiff was thrown and caused to fall from said car, through the door of same unto the track in front of the wheels of said car, and said agents and employees of said defendant, knowing that plaintiff so fell from said car on the tracks, by the exercise of reasonable care in the premises, being able to discover and knowing said fact, and by the exercise of reasonable care, being able to know that he was in a position of extreme peril, and unable to extricate himself, carelessly and negligently and wantonly and without regard for the safety of the life and limb of said plaintiff, failed and refused to stop said engine and cars and remove said plaintiff from his perilous position as aforesaid; and negligently failed to warn him in time, and negligently failed to prevent said accident, and continued to move said cars for a long distance, whereby said plaintiff was dragged for a distance of about 500 feet and his right leg run over by the wheels of said car and so injured that the same had to be immediately amputated, and causing plaintiff great pain and anguish, to the great damage of plaintiff in the sum of \$30,000.00.

Wherefore, the plaintiff demands judgment from said defendant in the sum of \$30,000.00 and for the costs and disbursements of said action.

HEBER McHUGH,

JOHN T. CASEY,

Plaintiff's Attorneys.

(Verification by Agnes Curtz.)

(Filed Oct. 13, 1911.)

(Superior Court.)

Petition for Removal

Comes now the petitioner, Northern Pacific Railway Company, defendant in the above entitled action, and respectfully shows and represents to this Honorable Court, as follows:

I.

That the above entitled action is a suit of a civil nature brought to recover the sum of Thirty Thousand Dollars (\$30,000.00) for injuries sustained by Tony Curtz, a minor, at Tacoma, Pierce County, Washington, on September 12, 1908; that this petitioner denies that it is liable for said injuries; and that said cause of action is more fully set out in the complaint in the above entitled action.

II.

That the amount in controversy in the above entitled action, at the time of the commencement of the above entitled action, exceeding and now exceeds, exclusive of interest and costs, the sum of Two Thousand Dollars (\$2,000.00).

III.

That your petitioner, Northern Pacific Railway Company, defendant in the above entitled action, at and before the time of the commencement of the above entitled action, was, since has been and now is a corporation, duly organized and existing under

and by virtue of the laws of the State of Wisconsin, and was at all of said times and still is a citizen and resident of said State of Wisconsin, and was not during any of said times, and is not now a citizen and resident of the State of Washington.

IV.

That the plaintiff in the above entitled action, at and before the time of the commencement of the above entitled action, was, since has been and now is a citizen and resident of the State of Washington.

V.

That the controversy in the above entitled action, and every issue of fact and law therein, is wholly between citizens and residents of different states; that the time of your petitioner, as defendant in the above entitled action, to answer or plead to the plaintiff's complaint has not yet expired and will not expire until the 4th. day of November, 1010.

VI.

That your petitioner herewith offers a good and sufficient bond for its entry in the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, within twenty (20) days after the entry of the order removing this cause to said Court on or before the first day of the next session of said Court, of a copy of the record in the above entitled action and for the payment of all costs that may be awarded in said Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, if said Court shall hold that this

suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that this Honorable Court proceed no further herein, except to make the order of removal as required by law and to approve said bond presented herewith, and cause the record herein to be removed to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, and it will ever prays.

NORTHERN PACIFIC RAILWAY COMPANY.

By GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Its Attorneys, Office and Post.

Office Address, Room 17 N. P. Headquarters Bldg.,
Tacoma, Wash.

(Verification by J. W. Quick.)

(Filed Nov. 2, 1910,—Superior Court.)

Bond on Removal

KNOW ALL MEN BY THESE PRESENTS:

That the Northern Pacific Railway Company, a corporation, defendant in the above entitled action and petitioner herein, as principal, and the National Surety Company, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Agnes Curtz, guardian ad litem of Tony Curtz, a minor, plaintiff in the above entitled action, in the

penal sum of Five Hundred Dollars (\$500.00) for the payment whereof, well and truly to be made unto the said Agnes Curtz, guardian ad litem of Tony Curtz, a minor, her heirs, executors, administrators, successors and assigns, said principal and surety bind themselves, their successors and assigns and each of them, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd. day of November, A. D. 1910.

Upon condition, nevertheless, *what* whereas the said Northern Pacific Railway Company, a corporation, has filed in the Superior Court of the State of Washington, for the County of Pierce, a petition for the removal of that cause therein pending wherein Agnes Curtz, guardian ad litem, of Tony Curtz, a minor, is plaintiff, and the said Northern Pacific Railway Company, a corporation, is defendant to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division.

Now, if the said Northern Pacific Railway Company, a corporation, shall enter in the said Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, within twenty (20) days after the entry of the order removing said cause to said Court or on or before the first day of the next session of said Court, a copy of the record in said cause, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States for the Ninth

Judicial Circuit, Western District of Washington, Western Division, if said Court shall hold that said cause was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force, effect and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
(Corporate Seal.) By Geo. T. Reid, Its Attorney.

NATIONAL SURETY COMPANY,

By W. H. Opie, Attorney in Fact.

Approved this 2nd. day of November, A. D. 1910.

C. M. EASTERDAY,

Judge.

(Filed in Superior Court, Nov. 2, 1910.)

Order of Removal

Upon application of the defendant, Northern Pacific Railway Company, a corporation, and upon the filing of petition and bond praying for the removal of this cause to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, the Court having considered the same, approved said bond and being advised in the premises,

IT IS ORDERED, That the above cause be removed to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, and that the record herein be transmitted by the Clerk of this Court to said Circuit Court of the United States for the Ninth

14 *Northern Pacific Railway Company*
Judicial Circuit, Western District of Washington,
Western Division, without any further proceedings
herein.

Dated and signed this 2nd. day of November, A.
D. 1910.

C. M. EASTERDAY, Judge.

(Filed in Superior Court Nov. 2, 1910.)

(Filed in Superior Court)

(Nov. 2, 1910.)

(Entered Jour. 130 Dept. 3, Page 70.)

Nov. 2, 1910.

Notice of Removal

TO THE ABOVE NAMED PLAINTIFF and TO
HEBER McHUGH and JOHN T. CASEY, her at-
torneys:

You and each of you will please take notice that
on the 2nd. day of November, 1910, an order was
entered in the above entitled cause transferring the
same from the Superior Court of the State of Wash-
ington, for the County of Pierce, to the Circuit Court
of the United States for the Ninth Judicial Circuit,
Western District of Washington, Western Division,
and that the record in said cause has this day been
duly filed in the said United States Circuit Court.

Dated this 17th. day of November, 1910.

GEO. T. REID,

J. W. QUICK,

L. D. Da PONTE,

Attorneys for Defendant.

Received a copy of the foregoing notice this 18 day of November, 1910.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

(Filed Nov. 25, 1910.)

Answer

Comes now the above named defendant and for answer to the complaint of the plaintiff, alleges as follows:

I.

For answer to Paragraph I of said complaint, defendant has no knowledge or information concerning the allegations therein contained and therefore denies the same to the extent that plaintiff be required to make proof thereon.

II.

For answer to Paragraph II of said complaint, defendant admits that it is a corporation and owns and operated a railway line and railway yards in the City of Tacoma, Pierce County, Washington, but denied each and every other allegation therein contained.

III.

For answer to Paragraph III, defendant admits that on or about the 12th. day of September, 1908, it owned and held on its switches in its yards at Tacoma, in the vicinity of Eleventh Street, cars that had recently been unloaded of wheat, and that some

times there was a small amount of loose wheat lying on the floors of said cars, but denies each and every other material allegation therein contained.

IV.

For answer to Paragraph IV, defendant denies each and every material allegation therein contained.

V.

For answer to Paragraph V, defendant denies each and every material allegation therein contained.

VI.

For answer to Paragraph VI, of said complaint, defendant denies each and every material allegation therein contained, save and except that the said Tony Curtz was injured by a car passing over his leg and that as a result of said injury the leg was amputated. And denies that any employe of defendant had authority to invite, encourage or permit the said Tony Curtz to enter a car for the purpose of sweeping or removing wheat therefrom.

Defendant for a further and affirmative defense to said cause of action, alleges as follows:

I.

That on or about the 12th. day of September, 1908, the said Tony Curtz was unlawfully and wrongfully upon the private premises of this defendant in its switching yards in the City of Tacoma, Washington, at a place where there were a number of railway tracks on which cars were frequently moved by means of switch engines constantly in operation in said yard, and at the time he was injured was a trespasser upon the tracks and private premises of this defendant

without the knowledge or consent of the defendant, and any injury which he received was caused by the negligence and carelessness of the said Tony Curtz in unlawfully and wrongfully going upon the tracks and premises of this defendant and trespassing thereon and failing to exercise ordinary care and caution for his own safety and protection.

WHEREFORE, defendant prays that plaintiff take nothing by reason of her said action and that defendant recover its costs and disbursements herein expended.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

(Verification by J. W. QUICK.)

(Acceptance of service.)

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
NOV 17 1910
A. REEVES AYRES, Clerk.
By SAM’L D. BRIDGES, Deputy.”

Reply

Comes now the above named plaintiff and for reply to the affirmative matter in the answer of the defendant, alleges, avers and states:

I.

For reply to Paragraph I of defendant's affirmative defense, plaintiff denies each and every material allegation therein contained.

WHEREFORE, plaintiff prays for judgment according to the prayer of the complaint.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

(Acceptance of service.)

(Verification by Heber McHugh.)

(Endorsed):

“FILED

U. S. CIRCUIT COURT

Western District of Washington

NOV 19 1910

A. REEVES AYRES, Clerk.

By SAM'L D. BRIDGES, Deputy.”

Motion for Judgment notwithstanding the Verdict

Comes now the defendant, the Northern Pacific Railway Company, and moves the Court for judgment notwithstanding the verdict in the above entitled cause for the following reasons, to-wit:

I.

That under all the evidence introduced on the trial.

of said cause the defendant is entitled to a judgment in its favor for the reason that the said evidence fails to prove negligence as alleged in the complaint on the part of the defendant and fails to prove facts sufficient to entitle the plaintiff to a judgment on the verdict of the jury.

Motion for a New Trial

In the event the Court denies the foregoing motion, the defendant thereupon moves the Court for a new trial for the following reasons, to-wit:

I.

That the verdict of the jury is not sustained by sufficient evidence and is contrary to law.

II.

Error of the Court committed on the trial of said cause and excepted to by the defendant.

GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for Defendant.

(Acceptance of service.)

(Endorsed) :

“FILED

U. S. CIRCUIT COURT

Western District of Washington

SEP 26 1911

SAM'L D. BRIDGES, Clerk.”

Order

Now on this 29th. day of September, A. D. 1911, this cause coming on to be heard on the motion of the defendant for a judgment notwithstanding the verdict, and further to be heard on the motion of defendant for a new trial, and the Court having heard the arguments of counsel, and being fully advised in the premises,

DOTH NOW ORDER that said motion of defendant for judgment notwithstanding the verdict and said motion of defendant for new trial herein be, and the same are hereby overruled, to which ruling of the Court defendant by its counsel duly excepted.

IT IS FURTHER ORDERED that the time for filing and serving the bill of exceptions in the above entitled cause be, and it is hereby extended to and including December, 1st. 1911.

BY THE COURT.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT,
Western District of Washington
SEP 29 1911
SAM’L D. BRIDGES, Clerk.”

Verdict

We, the jury empanelled in the above entitled case, find for the plaintiff, and assess his damages at the sum of FOUR THOUSAND Dollars (\$4,000.00).

C. W. NEAL, Foreman.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
SEP 23 1911
SAM’L D. BRIDGES, Clerk.”

Judgment

The above action having come on regularly for trial on the 22 day of September, 1911, the plaintiff appearing in person, and by his attorneys, Heber McHugh, John T. Casey, and Bates, Peer & Peterson, and the defendant appearing by its attorney, J. W. Quick; the jury having been duly empanelled and sworn, and evidence having been introduced on behalf of the plaintiff and the defendant, and both sides having rested and submitted their respective cases to the jury, and arguments having been presented and made to the jury on behalf of both parties; the jury having been instructed by the Court and having retired to deliberate upon its verdict, and the jury having returned into Court and declared its verdict in favor of the plaintiff and against the defendant in the sum of \$4,000.00;

Now, Therefore, it is ORDERED, ADJUDGED AND DECREED, that the plaintiff *Tony Cortz*, do have and recover of and from the defendant, the Northern Pacific Railway Company, a corporation, the sum of Four Thousand Dollars, besides his costs and disbursements herein to be taxed, and the

said judgment bear interest at the legal rate.

Dated and done in open Court this 29 day of Sept.,
A. D. 1911.

FRANK H. RUDKIN,

Judge.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT

Western District of Washington

SEP 29 1911

SAM'L D. BRIDGES, Clerk.”

Bill of Exceptions

The above cause coming on for trial in the above entitled Court on September 22, 1911, before the Honorable Frank H. Rudkin, presiding judge thereof, and a jury duly empanelled, the plaintiff appearing in person and by John T. Casey, Esq., Heber McHugh, Esq., and C. O. Bates, Esq., his attorneys, and the defendant appearing by J. W. Quick, Esq., its attorney, the following proceedings were had, to-wit:

The opening statement of the case to the jury was made by Mr. Casey and thereupon the following evidence was introduced.

Mr. BATES: It is admitted by counsel that Mrs. Curtz, mother of Tony Curtz, has been appointed guardian ad litem of Tony Curtz for the purposes of this action.

Mrs. CURTZ, being called and sworn as a witness on behalf of the plaintiff, testifies as follows:

(Testimony of Mrs. Curtz)

DIRECT EXAMINATION.

(By Mr. BATES):

I am the mother of Tony Curtz. Tony is fourteen years old now and was eleven years old at the time he was injured. At the time he was injured we were living on Yakima Avenue in Tacoma, and on that day I was engaged in nursing a sick lady who lived across the street from where we lived. I left home about eight o'clock in the morning of September 12, 1908, and at that time Tony was in the yard trying to cut wood and kindling which he was carrying up stairs where we lived, as we lived on the second floor of the house. His two small brothers and Maggie Slabb, his cousin, were with him. The next time I saw him he was in the hospital and that was between ten and eleven o'clock A. M. I went to the hospital and when I got there his leg had been amputated and he was on a bed without any pillow so that his head was down low and his legs were elevated. He was cold as ice and I thought he was dead. He was there three days before he knew me. He remained in the hospital just four weeks and he suffered a great deal. After he got out of the hospital it was about a year before he got around much; it was about a year before he was able to go to school. He used two crutches for about a year or more, maybe two years, but now he only uses one crutch.

TONY CURTZ, the plaintiff, being sworn, testifies as follows:

(Testimony of Tony Curtz)

I am fourteen years old. I was eleven years old when I was hurt. The morning I got hurt I was at home chopping kindling and my mother left to go to her work. While I was chopping some wood and carrying it up to the house, and when I got through my cousins asked me if I wanted to go down after wheat with them. I did not want to refuse so I went down with them. We went down the steps at the 11th Street bridge and we went up the dock a ways and then came back and met a man there. He had on a blue jacket and overalls and he says: "Good morning." He had hold of a piece of iron which had kind of a round iron on the top and he was turning that around. I did not know what it was at the time, but I have since learned it was a switch. He said "good morning" to us and we said "good morning," and he asked what we came for and we told him we came for wheat, and he says to us "there is lots of it over there in them cars" and he pointed his finger and said "you better hurry over before the other boys and girls get it."

Mr. QUICK: We object to that as incompetent and move to strike the answer of the witness and the statement of the witness as to his conversation with this man as being incompetent.

The COURT: I do not think the permission of

(Testimony of Tony Curtz.)

this man would be any excuse unless it is shown he had authority. I will permit this testimony for the purpose of showing he had knowledge that the boy was there, but any statement he may have made the jury will disregard.

Mr. QUICK: We except to the ruling of the Court that this evidence may be received for the purpose of showing knowledge.

So we went over and put our wagon in front of the door of the cars and we went right in. We thought there was no danger because the man told us to go over there and get it before the others got it, and we went over and got into the cars and started in shoveling the loose wheat and an engine came and gave it a big crash and bumped right in and knocked me out of the car in the yard and I did not know anything afterwards at all. When I went down there I saw lots of children around there. Some were on the tracks and some were on the side of the hill playing. I saw quite a few of them getting wheat. I do not remember how many there were. This was on Saturday. I did not see any engine moving or switching back and forth around there. We had a little red wagon and a cart. My cousins, Maggie Slabb and Phil Slabb, were with me. The door of the car was in the side of the car and we left the wagon and cart at the side of the car about two feet from it. The cars were this side, that is south of the 11th Street bridge, and about as far as across the street.

(Testimony of Tony Curtz.)

My cousin Maggie was eleven years old and Phil was younger than she. I had never been down there before and had never been at or around the railroad tracks or the depot where the trains were going back and forth. I was going to school at the time. I know that the engine gave the car a big jerk and knocked me right out and I did not know anything at all after that until I found myself in the hospital and my leg had been taken off. I stayed in the hospital about a month and I suffered a great deal of pain. My back and leg hurt me the worst; my back hurts me yet. I used two crutches about a year and a half or two years and now I use one crutch. My leg was cut off up close to the hip.

CROSS-EXAMINATION.

(By Mr. QUICK) :

I know what the railroad yards are and the place where we went down was into the yards. There were not very many cars down there. We walked up the dock a little ways. We did not see anything up there and we started back. The car I went into was the end car of the string of cars standing there. I do not remember which side of the car I went in at. The cars were standing so that one side of them was next to the water and the other side was towards the hill and I think we went in on the water side I think we had been there about fifteen or twenty minutes. I do not know what became of the man I was talking to. I did not see any engine at all and had not seen

(Testimony of Tony Curtz.)

any cars moving about there. I do not know what he was turning the switch for, but I am sure he was turning the switch and that he had on blue overalls. The girl and boy who were with me did not get into the same car I did. They got into some other cars on the same track. We took brooms with us and I had a broom that the handle had been broken off so that the handle was about a foot and a half long and I was using this to sweep up the loose wheat in the car. I got this broom out of the barn where we lived. My cousins told me to take it along as Gus Slabb had been down there before. I had not seen any engine or heard one. I was going to take this wheat home to feed the chickens. The Slabbs lived on the first floor and we lived on the second floor out on Yakima Avenue.

MAGGIE SLABB, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Maggie Slabb)**DIRECT EXAMINATION.**

I am a cousin of Tony and we were living in the same house where Tony lived, only we lived on the first floor and they lived up stairs. The children out there had told us about getting wheat and so I started down with my brother and told Tony if he wanted to he could come along with us. I took my little red wagon and Tony took his dump cart and we went down the stairway at the 11th Street bridge and there was a man there on the tracks under the bridge

(Testimony of Maggie Slabb.)

turning something and says: "Hello boys and girls," and we says: "Hello" and he says: "what are you after" and we says: "We are after wheat," and he pointed his hand and shows us some cars on the track there and said there was lots of wheat we could get there because other people were getting some there too. So we went down to the cars and I got in the car. I do not know what car Tony got in and I started sweeping in the car and we were there just a little while when a big jam came and I stopped and jumped out and looked for Tony. I had my brother standing there and we were looking for Tony and we found him under the train run over. He left his wagon right in front of the car door and I left mine in front of the door of the car about two or three feet away from the door. I think it was on the water side. I did not know what the man was turning then, but I know now. It was a switch. When we went down the steps onto the tracks, we then went south, about the distance of across the street, from the bridge to the cars. I saw some other children there; about a dozen or more. Some were on the bank and some below playing around. I don't remember seeing any other man except this one. I never saw any engine and did not see any cars moving. My older brother had been down there and got wheat. He is dead now. They come with an ambulance and took Tony away.

Mr. QUICK: I move the Court to withdraw from

(Testimony of Maggie Slabb.)

the jury the evidence of this witness and the witness Tony Curtz as to what other children told them about getting wheat down there, as incompetent, irrelevant and prejudicial.

Mr. BATES: That is put in if the Court please to show how they come to go down there.

Mr. QUICK: The fact that other children said they got wheat down there I think is very prejudicial.

The COURT: (To jury) The fact that other children said they had been down there is not evidence they were there, and you should not consider this statement from outside of the Court. You will consider only the testimony given here in open Court and what is hearsay you will utterly disregard.

CROSS-EXAMINATION.

(By Mr. QUICK):

Tony had been going to school but I think school was over just then. He was backward in his studies for a boy of his age. I had never been down in the yards before and when we went down the steps at 11th Street bridge I saw a few railroad tracks; I don't know how many. I saw cars standing on the track south of the bridge but I do not know how many there were. We went down to where the cars were and I got up in a car but I do not know whether my brother got into one or not and I did not see what car Tony got into. I do not remember how I got into the car, but I climbed up into the car some way, but there was no ladder there. The man I saw was under

(Testimony of Maggie Slabb.)

the 11th Street bridge. I don't think there was any other man around there and I did not see any engine and did not see any cars moving, and I never saw this man after we saw him that once. We were getting the wheat for ourselves and I do not know who the wheat belonged to.

REDIRECT EXAMINATION.

(By Mr. BATES) :

There was not very much wheat in the car. We had just swept it up when the train bumped. I had a little dust pan full, that is all.

The COURT: Wheat left over after unloading, I presume?

Mr. QUICK: Yes, sir.

The COURT: I do not think there is no dispute about that.

Tony was backward in his studies. He was in the third and I was in the fourth grade. I think we had lived in Tacoma three or four years, and Tony I think was able to go to school every day. He was never real healthy I think. He was always complaining of something; headache or stiff neck.

RECROSS-EXAMINATION.

I guess he started to grow the last one or two years, and he sells newspapers all the time; I guess for two years or more.

MARK MALONEY, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Mark Maloney)

I live at 611 South 27th Street and am eighteen years old. I know Tony Curtz and had seen him around before he got hurt. I was down in the yard the day Tony got hurt, and I had been in the habit of going down there.

Q. For how long?

Mr. QUICK: We object to that as immaterial.

The COURT: Objection overruled and exception allowed.

A. Probably six months or a year. The cars that had been unloaded would have some wheat left in them and I would go down to get the wheat probably once a week.

Q. During those six months or such a matter before the time Tony got hurt had you seen other children, men and women down there getting wheat?

Mr. QUICK: We object to that as immaterial and incompetent.

The COURT: Objection overruled and exception allowed.

A. Yes, I have seen them down there. Seen no women though. Seen boys and girls and men, but I do not know just how many, but there would be quite a few of them.

The tracks there run between the bluff on the west and the water on the east, and there are docks on the east side of the tracks from 15th Street north

(Testimony of Mark Maloney.)

for a long distance. There is a bridge over the tracks at 11th Street. The docks where they unload wheat are north of 11th Street and on the east side of Dock Street. There was one track at 11th Street in Dock Street and then there were several tracks west of Dock Street. I don't know how many; four or five, I think. I have seen the railroad men around there when I was getting wheat and they have seen me getting it. I saw Tony and a boy and a girl with him over under the 11th Street bridge. There is a switch there under the bridge. They went up towards the cars, the string of cars on Dock Street, I did not notice how many cars there were, probably four or five; maybe more. These cars were on the track that runs across Dock Street there at the bridge. I did not see them any more until Tony was pulled out from under the wheels. I had gone into a car and I got a fearful bump that knocked me against the side of the car and I jumped out, and I heard the little girl holloing and I got around on the other side of the car to flag the switchman that was up ahead and tell him somebody was hurt and he stopped the train.

Q. When you were down there getting wheat before and you saw these railroad men there did you have anything to say to them about getting wheat?

Mr. QUICK: We object to that as incompetent, irrelevant and immaterial.

Mr. BATES: The only object is to show that they knew these boys were there to get wheat.

(Testimony of Mark Maloney.)

The COURT: You may ask him whether they objected or not.

Mr. QUICK: We except to the ruling.

A. No, sometimes they told you to go ahead where there was some wheat. Told you where there was some. Pointed it out to you.

CROSS-EXAMINATION.

(By Mr. QUICK):

These railroad men were the switchmen and workmen working for the railroad. They never ordered me out. I never saw any special man patrolling the tracks to keep the boys away, and I was never ordered away from there by any of Guthrie-Balfour Company's men. I had come down the tracks at 9th Street and got under the 11th Street bridge at the time Tony and these children did, and a man told us we could get the wheat over at those cars. I guess the man was a switchman, as far as I know. There was no engine around there and no cars being moved, but there was an engine up about 15th Street. I got into one of the cars from the water side and I think the others got in from the water side too. I do not know of any engine passing while we were in the cars, and had not noticed any switchmen around there during that time. I did not know the Curtz boy at that time but had seen him around the neighborhood where we lived, as we lived in the same neighborhood; that is about fifteen blocks from where the accident occurred; about a mile or more away.

EDDY MALONEY, witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Eddy Maloney)

DIRECT EXAMINATION.

(By Mr. BATES) :

I am fourteen years old and a brother of the witness Mark Maloney. I did not know Tony at the time he got hurt to speak to him, but we lived in the same neighborhood. I was down in the railroad yards with my brother at the time Tony got hurt. I had never been there before. I saw Tony and his two cousins but I did not see any other children down there. I saw them below the 11th Street bridge. We went down by the loaded cars and there was nothing down there and so we came up by the empty cars south of 11th Street and we went into the car from the bay side and pretty soon Tony came and looked into the car I was in and they went on. When the cars were jammed I jumped out and I saw him under the car dragging along and I turned my face and ran to the end of the cars and met my brother and we went right straight home. I did not know any engine was working there until there was a good bump and knocked me up against the car and I grabbed my shovel and sack and jumped out of the door.

CROSS-EXAMINATION.

(By Mr. QUICK) :

The engine was up at the other end of the cars, down pretty near 15th Street. My brother was in

(Testimony of Eddy Maloney.)

one car and I was in another. I do not know where Maggie and her brother and Tony were. When I jumped out I ran towards 11th Street and across the tracks and met my brother, and we went right straight home.

EDWIN WOLFE, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Edwin Wolfe)

DIRECT EXAMINATION.

(By Mr. BATES):

I am fourteen years old and I lived up in the same neighborhood with Tony Curtz, but did not know him very well. I had been going down in the railroad yards for about a year before Tony was hurt, whenever my mother would let me, which would be four or five times a week sometimes, and other times not more than once a week. I went down there to get wheat.

Mr. QUICK: We object to this line of evidence.

THE COURT: Objection will be overruled. The only purpose of this testimony is to show knowledge on the part of the company, and it is admitted for that purpose. The defendant is allowed an exception.

When I would go down in the yard to get wheat before Tony was hurt, I have seen other children and men down there getting wheat. Sometimes there would be one, two or three and sometimes none. I would see the switchmen down there handling the

(Testimony of Edwin Wolfe.)

cars and they have told me—

Mr. QUICK: I object to that as incompetent.

Mr. BATES: I do not want to get over the rule, but I want to show that these men were there after wheat in the car that is all.

Mr. QUICK: If they did know it, it would not bind the company.

THE COURT: The objection is overruled and exception allowed.

I was down there the day Tony got hurt. I came down by the 11th Street bridge and I saw him there a little south of the bridge. I did not see anybody else but Tony; that is all. The wagons were on the water side from the cars and about four feet from the car. Tony was going to get into the car when I saw him. Then I went north towards 9th Street. When I came back I heard about the accident and I saw the ambulance down by 15th street. There was an engine down by 15th street. I could see the smoke from it. I saw one switchman there under the 11th street bridge.

WILLIE THERKILESON, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Willie Therkileson)

I live at 2211 "I" Street and work at the post office. I am eighteen years old. I know Tony Curtz, as he lived up in the same neighborhood before he got hurt, for two or three years I guess. I was in the habit of going down into the freight yards to

(Testimony of Willie Therkileson.)

get wheat. I would go down after school and on Saturday, and I have seen other children and men down there. No body ever ordered me away and the railroad men working there knew I was there getting the wheat. I did not see Tony the day he got hurt. The cars would be all along the wharf there, some of them standing right up against the docks as far north as the London Dock, and some cars would be on the side tracks too. One of the tracks crossed Dock street there at the 11th Street bridge, and Dock street runs on the east side of the tracks from 11th Street to 15th Street. The track that crosses Dock Street at 11th Street runs on the east side of Dock street and is up next to the docks.

CROSS-EXAMINATION.

(By Mr. QUICK) :

The yards run all the way from 15th street north to 7th street, a distance of about a mile, and there are a great number of tracks and side tracks and switches, and usually long strings of cars there. Between 11th street bridge and 15th street there are four or five tracks and north of 11th street there are a great many tracks. I never was ordered out of the yards by the switchmen. The switchmen when they are around there are pretty busy handling cars and they never got after us.

(Testimony of Willie Therkilesen.)

REDIRECT EXAMINATION.

(By Mr. BATES) :

The cars we usually got the wheat out of were most of them along right up next the docks between 11th street and 7th street.

J. P. FARLEY, a witness called on behalf of the plaintiff, testifies as follows:

(Testimony of J. P. Farley)

DIRECT EXAMINATION.

(By Mr. BATES) :

I reside in the city of Tacoma and am a teamster for the Tacoma Truck Company and I am familiar with the conditions along Dock Street. In going to the docks we usually drive down 21st street or 15th street to as far north as 9th street. We drive from 21st street to 15th street on the brick pavement and from 15th street follow Dock street straight north. The Municipal Dock is the first one north of 11th Street and then the Alaska Pacific Dock, then the London Dock, then the Balfour-Guthrie Grain Warehouses and then the Eureka Dock. Between 11th street and 15th street there are six tracks. The one on the east side crosses Dock Street at the 11th Street bridge then runs on the east side of Dock Street close up to the warehouses. The water front is east of Dock Street. I would be down there some three or four times a day with my team and I have seen men and children getting wheat out of the cars quite frequently.

(Testimony of J. P. Farley.)

CROSS-EXAMINATION.

(By Mr. QUICK) :

The yards are on the west side of Dock street and they run from Prescott clear to the Smelter, a distance of six or seven miles, but the most tracks are between 11th and 7th streets. At the foot of 9th street there are probably 50 or 60 tracks and usually five or six switch engines are working in there and the switchmen are kept quite busy with their work. I never saw them order children away, but they may have done so.

F. L. RAYMOND, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of F. L. Raymond)

DIRECT EXAMINATION.

(By Mr. BATES) :

I live in Tacoma and am a teamster for the Tacoma Truck Company and have been for about six years. I am well acquainted with the situation in the freight yards between 9th and 15th streets in Tacoma. Dock street runs between 9th street and 15th street and one of the railroad tracks crosses Dock street just south of the 11th street bridge and then runs north on the east side of Dock street and close to the grain warehouses. The tracks between 11th street and 15th street are west of Dock street, between Dock street and the bluff, and this one track switches off about 100 yards south of the bridge and it angles across Dock street. Before September, 1908, I was

(Testimony of F. L. Raymond.)

along there from one to five times a day and I had seen children, boys and girls, along between 9th street and the bridge getting wheat out of the cars quite frequently. The railroad men would be around there switching in the yards at the time but I never heard them order any one away.

CROSS-EXAMINATION.

(By Mr. QUICK) :

Q. You do not know but what they had been?

A. I could not say whether they had or had not been. I never heard the switchmen give them any orders.

Q. Were you there the day Tony Curtz got hurt?

A. Yes.

Q. Where were you at that time?

A. At the time I should judge I was about even where the switch leads off from the track on the west side of the Dock street. I was about even with that switch, going south, with a load of sugar.

Q. And where was the engine?

A. The engine was about 15th street as near as I could say. I could not see it from where I was because I was around the curve from the engine.

Q. Was there a string of cars reaching from near 11th street south to about 15th street?

A. There was a string of cars. I was pretty near up to the end of the cars when the engine hitched on to them, and that was I should judge,—about 75 feet south of the 11th street bridge.

Q. And the other end of the string was down, it

(Testimony of F. L. Raymond.)

was somewhere.

A. It was somewhere in the neighborhood of the Pacific Fruit, along in there, about 15th street. It was over in the yards.

Q. That would be the distance of about six or seven hundred feet wouldn't it?

A. I think it is in the neighborhood of five or six hundred feet.

Q. How long had you been there at the time this accident occurred?

A. How long had I been down at the dock?

Q. Yes?

A. I had been there, I could not say. I think it was my second trip that morning. I make three trips in the forenoon, and that was my second trip. I do not remember how long I had to wait before I got my load. There was a couple of teams ahead of me. We have to take our turn. I do not know just exactly how long that was.

Q. Had you seen Tony Curtz before he got hurt?

A. No, sir, I did not see him while I was loading there. The first I seen of him was when the train hooked on.

Q. Where were you loading?

A. I was back in under the 11th street bridge. There are two places we can back in and I was in the middle place on the left hand side facing south, the middle place I got my load of sugar.

Q. Had you seen any children around there?

(Testimony of F. L. Raymond.)

A. I had not seen any children around there at that time.

Q. Did you notice any switchman around there?

A. I did not notice any switchman, no, sir.

Q. You say you were under the 11th street bridge?

A. Yes, sir, I was under.

Q. How long did it take you to load?

A. It is according to how many trucks you have. I have loaded in eight minutes and then it takes half an hour to load.

Q. You do not know how long it took you that day?

A. No, sir, I do not know how long it took me that day.

Q. Did you notice any switchman there under the 11th street bridge?

A. No, sir, I did not.

Q. Had there been any switching of cars there while you were there?

A. Not while I was there, not as I remember.

Q. What called your attention to the boy?

A. When I first seen the boy, I seen him when the cars hit. When I first seen him, as near as I can remember now, he was beside the train, but when the engine hit he got down on his hands and knees and crossed the rail right in front of the rear trucks, on the east side of the car, and picked up either a broom or a shovel, a short-handled broom or shovel, just as the train started, and when the

(Testimony of F. L. Raymond.)

train started I am pretty sure the wheels did not run over the boy because there was no blood there. As near as I can figure out there is one of the bolts that comes through the bolster that caught in his clothes and jerked him along and rubbed him on the ties and broke his leg and mangled it all up. One of the main bones was sticking out through his thigh. They dragged him in the neighborhood of 100 feet before he dropped out. When I saw him I started to get my team to start up, to get them to stop the engine as quick as I could. The switchman was on the other side of the train so that I could not signal the engineer. They were backing in, the engine was.

Q. The switchman was on the opposite side of the train?

A. The switchman was on the opposite side of the train from where the boy was.

Q. Then he could not see him?

A. He could not see him. I saw that I could not make any headway by trotting my team. I stopped the team and I jumped off. I hollered at the two boys that were loading poles for Harrison Brothers, to see if they could signal and stop the train, as there was a boy run over by the train and they were dragging him. They run out, I think the little fellow he run out and he hollered. There was so much hollering going on. The boy was laying there on the ground.

Q. The switchmen at the time were down at the

(Testimony of F. L. Raymond.)

south end of the train?

A. I think the nearest that there was any switchmen to him, I do not believe there was a switchman on this side of the train. I believe the nearest was at least two hundred feet.

Q. The engine had come in from the south end?

A. The engine had come in from the south end and hooked on to the train of cars and started out a little.

Q. And as you saw it the boy was on the ground at the time the coupling was made?

A. When I first seen the boy as near as I can remember now he was on the ground.

REDIRECT EXAMINATION.

(By Mr. BATES) :

Q. When you are loading sugar there you are pretty busy doing that aren't you?

A. You bet you.

Q. You are not looking around to see if there are any switchmen there?

A. Yes we are busy; we have to watch the truckers.

(By A JUROR) :

Q. You saw the train when it hooked on to the car when it made the coupling?

A. I saw the car at this end move.

Q. You saw it when it made the coupling?

A. Yes.

Q. And you saw the boy at the same time on the ground?

A. Yes, sir.

(Testimony of F. L. Raymond.)

Q. You did? A. Yes.

Q. Then he could not have been in the car when the coupling was made?

A. I do not think he could.

Q. He was stooping over?

A. After they had coupled the cars, as near as I can figure it, after they had coupled on to the cars he went to get his broom, not thinking about the cars starting up, went to get his broom for fear he would lose it, as near as I can see, and he crawled over and reached in front of the rear trucks, and just as the car started he threw himself around with his broom or shovel or whatever it was in his hand, and the bolt that is below the bolster caught in his clothing and dragged him and crushed the leg all along there. The switch crew and myself examined the track and I could see no blood on the rails or on the car where the wheel had run over him.

Q. That was just an ordinary coupling was it?

A. That was just an ordinary coupling that they make every day.

(By Mr. QUICK):

Q. So that the jury can get it a little plainer, the engine came in from the south end of the string and struck the cars and made the coupling?

A. Yes, sir.

Q. And then the cars stopped after the coupling was made?

A. They stopped for an instant, yes, sir.

Q. And the boy reached in in front of the rear

(Testimony of F. L. Raymond.)

trucks? A. Yes, sir.

Q. And the train then started south?

A. Started south for the grade.

(By A JUROR):

Q. Do you know where the broom was?

A. The broom was between the rails, right in under, right pretty near in under the wheels, it was. I should judge the way it looked, after the coupling had shoved the cars back the broom was right inside the rail, about the way I should judge, just about that far (indicating), that far in front of the wheel. From where I was it looked that way. The cars were at least 100 feet from me, the car he was under. There were about three cars at least, two or three cars behind the car that caught him.

Q. Did you see him before the train made the connection or coupling?

A. I did not,—I seen him, yes.

Q. I mean you saw them?

A. I did not take any notice to them. I seen the little wagon as I pulled out. I looked down that way as men generally do. A man gets a chance to look around a little bit down there.

Q. You do not know then whether he fell out from the door?

A. I could not say, no, sir.

(By ANOTHER JUROR):

Q. But you saw him on the ground reaching for this broom when the coupling was made, didn't you?

A. He reached for the broom after the engine

(Testimony of F. L. Raymond.)

had coupled on to it.

Q. The broom was underneath the car?

A. Yes the broom was underneath the car.

Q. Then it would have been impossible for him to have been thrown out of the car and reached under there after the broom, after he had been thrown out?

A. The way it looks like to me, yes, sir.

DIRECT EXAMINATION.

(By Mr. BATES) :

Q. But you do not know as a matter of fact about that at all.

A. I do not know the boy was in the car before at all.

Q. When you came out from the dock and turned south with your sugar you saw two carts there?

A. No, sir, I did not notice the two carts. I only noticed one little two-wheeled cart.

Q. You saw only one little two wheeled cart?

A. Yes.

Q. That was outside the car?

A. Outside the track, yes, sir.

Q. And there wasn't any children in sight?

A. I did not see the children.

Q. You did not see the children?

A. I did not take any notice to them. If there were children I did not take any notice to them. The first thing I seen—

Q. You saw the cart there, but you saw no children?

(Testimony of F. L. Raymond.)

A. I seen the cart after the boy was caught, when I went up there. That was where the cart was. I did not see the cart when I first pulled out.

Q. You did not see anybody when you first pulled out?

A. I never noticed the whole business until after the car struck him. Then I noticed the cart?

Q. You were driving south and so you do not know as a matter of fact whether the boy was in the car and was knocked out, or not? A. No.

RE-CROSS-EXAMINATION.

(By Mr. QUICK) :

I was on the east side of the track next to the water and the track bends to the west. Here is the main line coming down west of Dock street between the street and the bluff, and this track that the cars were on comes up from 15th street on the west side of Dock street to a switch south of the bridge, and then it angles across Dock street to the west side of the street under the bridge and then runs along north by the warehouses.

The switching crew was on the west side of the track in the curve on the opposite side of the cars from where I was.

(A JUROR) :

Q. How far were you from the car when you first saw him?

A. When I first saw him I was about 100 feet.

Q. Good clear view? A. Yes, sir.

MRS. CURTZ, being recalled, testifies as follows:

(Testimony of Mrs. Curtz)

DIRECT EXAMINATION.

(By Mr. BATES):

Tony's health was very poor from the time he was born until after he was injured. He only weighed three pounds when he was born, and he was eight months old before he could hold up his head. He was always backward in his studies, being about two grades behind other boys of his age. He was not as large as his cousin Maggie who was of the same age. About two years ago he began to grow and has been much healthier since then.

Mr. QUICK: He is a big husky boy now all right?

A. Yes.

Mrs. SLABB, being called and sworn as a witness on behalf of plaintiff, testifies as follows:

(Testimony of Mrs. Slabb)

I am the aunt of Tony and have known him all his life. He was a little tiny baby, weighed three pounds when he was born and he never felt well, always had something the matter with him. Maggie was lots bigger than he was. He started to grow about two years ago and I think he will be a man all right now.

Mr. BATES: It is stipulated that Dock Street at that time was a regularly laid out and travelled street of the city of Tacoma.

Plaintiff rests.

Defendant's Motion

Mr. QUICK: Defendant moves the Court to withdraw this case from the jury and grant a non-suit for the reason that the evidence is not sufficient to make a case for submission to the jury.

The COURT: If this case rested on the authority of a switchman to grant permission to go into this car and take this wheat or if it rested on actual knowledge on the part of the train men that he was present, I would have no hesitation in granting the motion, for there is no proof here that any person in authority had notice of the presence of these boys, or is there any proof that the switchman had any authority to give them permission to go there. In fact, I struck out the testimony that he gave permission.

The only theory upon which the case can go to the jury is that of imputed notice arising from the testimony as to the custom which prevailed. Without commenting in any way upon the testimony I will for the present deny the motion.

Mr. QUICK: We except to the ruling of the Court.

The COURT: Exception allowed.

THEREUPON, to sustain the issues upon its part, the following witnesses were called in behalf of the defendant.

A. A. DIKEMAN, being called and sworn as a witness for the defendant, testifies as follows:

(Testimony of A. A. Dikeman)

DIRECT EXAMINATION.

(By Mr. QUICK) :

For about six years I have been foreman of the Balfour-Guthrie warehouses along the water front. Our warehouses are 1150 feet long and we store and handle wheat which is shipped from here.

Q. What effort do you make to keep boys away from the cars?

Mr. BATES: I object to that as immaterial. He is not an employe of the railroad company.

The COURT: I will overrule the objection.

Mr. BATES: Give us an exception.

A. I have repeatedly ordered boys away from our premises and away from cars that were unloaded and I have given orders to our men who were working there that when boys came to order them away and not allow them there at all. I have done this ever since I have been foreman.

CROSS-EXAMINATION.

(By Mr. BATES) :

Our warehouses are north of what is known as the Municipal Dock at 11th Street. The south end of our warehouses begin about 1100 feet north of 11th Street and in handling grain, which we receive in cars, we have ordered boys away from the cars.

Mr. WILLIAM CUMMING, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of William Cumming)

I am Special Agent for the Northern Pacific Railway Company and have been for nine years.

(Testimony of William Cumming.)

Q. What effort Mr. Cumming is made to keep boys out of the yards and away from the grain tracks during the season that grain is being moved?

A. I put a special watchman on during this season of the year when wheat is coming in in addition to the regular watchman, and at the time this boy was hurt I had a man by the name of F. L. Wiley especially employed and instructed to keep small boys out of the yards and from jumping on moving trains, etc., and he experienced quite a lot of difficulty. He made daily reports to me.

Mr. BATES: We object to that.

The COURT: Do not tell anything that came to you from others. Mr. Wiley was on during the grain season of 1907 and 1908. During that time we had two watchmen in the Moon Yard and one at the head of the bay.

Q. And what were your instructions to them in regard to children found in the yard?

A. To arrest them if they found them taking wheat from whole sacks or knifing the sacks. Sometimes they would knife the sacks and let the wheat run out and come back and claim that they found it on the ground, and so forth. I especially instructed them to keep these boys out for fear of any accident.

CROSS-EXAMINATION.

(By Mr. BATES):

As special agent I have charge of the Tacoma division, which extends from Auburn south to Port-

(Testimony of William Cumming.)

land and east to Ellensburg. I have assistants under me. I was anxious to see that the sacks were not cut and the wheat stolen and was attempting to guard against that during the wheat season.

EDWARD C. TROW, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of Edward C. Trow)

I am working now as gate-man at the Union Station here. In September 1908 I was a switchman and was foreman of the switching crew that coupled onto the cars at the time the plaintiff was hurt. Switchmen Housman and Hughes were working with me at the time. There was a string of empty cars standing on the grain lead track and extended from about a couple of 100 feet south of 11th Street to near 15th Street. There were about 18 cars in the string. We came in onto the track for the purpose of moving these cars from the switch at 15th Street and coupled onto the south end of the string. The track these cars were standing on is on a curve, the inside of the curve being the west side of the track which is the side away from the water. It is the duty and custom of switchmen to work on the inside of the curve so that they can see the cars the full length of the string in order to know that they are all coupled together and move when the engine starts to pull out. We could not see along the opposite side of the string of cars as our view would be shut off by the body of the cars. Nor could we have seen had we been on the other side

(Testimony of Edward C. Trow.)

on account of the curve without going across Dock Street toward the water. I had not seen any children about the cars before that time and did not know that any were there. We came in with the engine from the south and coupled onto the cars and then started to pull out toward the south and I started to walk back north along the cars when I saw a young fellow running towards me waiving his arms and I imagined there was something wrong and I gave a stop signal to the engineer and the cars were stopped. I do not think we moved over a car length after I gave the signal and not over five or six car lengths all together. I went on back and found that a boy had been hurt. This was the first I knew of any children about the yard or cars. I have been a switchman for fifteen years and am familiar with the authority of a switchman and his duties.

Q. Has the switchman any authority to permit children to enter box cars?

A. No, sir.

Mr. BATES: I understand your honor has ruled as a matter of law that they have not any authority.

The COURT: I have ruled as a matter of law that there is no testimony in the case up to the present that a switchman has any such authority, and if there is no further testimony on that question I will so instruct the jury.

Mr. QUICK: If they will state that they do not intend to introduce any evidence:—

(Testimony of Edward C. Trow.)

Mr. BATES: We do not intend to introduce any evidence along that line.

The COURT: In the present state of the testimony I will charge the jury as a matter of law that a switchman has no authority to authorize a person to go in a car for any purpose whatever.

Mr. QUICK: Then it will not be necessary to offer any evidence on that question.

CROSS-EXAMINATION.

(By Mr. BATES):

I had been working as a switchman down there in the yards for about nine years and my duty as a switchman took me the whole length of the yards from 15th Street to the Flyer Dock, and also over the tracks at the head of the bay and out to South Tacoma. There were none of my crew on the water side of the train on account of the curve and if they had been they could not have seen the rear cars without going across Dock Street over to the bay side. This track does not run in Dock Street but parallels the street and then crosses it on an angle up at the 11th Street bridge. I do not think you could see the north end of the cars by going out to the middle of Dock Street.

RE-CROSS-EXAMINATION.

(By Mr. QUICK):

Q. Was it the custom of train men in handling cars on the curve to stay on the inside of the curve?

A. It is. It is customary in switching in the yard for you to get on the side where you can see the

(Testimony of Edward C. Trow.)

rear car. It is not customary to walk back because there is not supposed to be anybody underneath or around the cars unless there is a blue flag placed there by the car men. That signifies there is a man about the car or underneath, but in the yards it is customary to go and couple on at any time during the day or night, and start the movement of the cars without going back. The only occasion or reason a person would go back was simply because the cars were not coupled together. If you can see the rear end coming, that is sufficient. But if it is dark and a man cannot see them, a man goes back to be sure he gets all the cars.

FRANK HOUSMAN, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of Frank Housman)

DIRECT EXAMINATION.

(By Mr. QUICK) :

I have been a switchman for the defendant for about twelve years and was a member of the crew under Mr. Trow at the time the plaintiff was hurt. I was working with the engine. The cars were standing on a switch track which connects with the main track close to 15th Street and the south end of the cars were just in the clear at 15th Street. We came in with the engine from 15th Street switch and I coupled onto the cars. We then started to pull out and moved about five or six car lengths going south I saw foreman Trow give signal to stop. The engine

(Testimony of Frank Housman.)

stopped with the engine and car over 15th Street and as I knew there must be something wrong, as I saw Trow going back, I cut the train so as not to block 15th Street crossing, as it is a very busy crossing, and then went back to the rear where I saw the boy with his leg off. I did not know anything about any children being on or about the cars prior to that time. I had been working in this yard about four years.

W. J. HUGHES, being called and sworn on behalf of the defendant, testifies as follows:

(Testimony of W. J. Hughes)

DIRECT EXAMINATION.

(By Mr. QUICK):

I am a switchman for the defendant company and was working under Mr. Trow at the time plaintiff was injured. I came in with the engine when we coupled onto the south end of the string of cars and did not know anything about this boy or any other children being around the cars until I went back after Mr. Trow told me he thought something was the matter at the hind end. I had been working as a switchman down here in the yard for about eight years.

J. W. CLARK, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of J. W. Clark)

I am a farmer and live at O'Brien, Washington. In September 1908 I was working in Tacoma for the

(Testimony of J. W. CLARK.)

Telephone Company and at the time this boy was hurt I was loading poles on a wagon on the west side of Dock Street about 150 or 175 feet from where the boy was hurt. These poles were east of the track the cars were on between the track and the street. I saw three children come down about 15 minutes before the accident. At the time of the accident I was standing with my back toward the north and I heard the boy holler and I looked around and saw him being dragged by the car. The train dragged him right up to where I was. I run off to the left toward the water to see if I could see the engine to stop it. The crew were on the other side and I could not see them. I heard them holler on the other side and the train stopped and the lad got out from under the wheels right at the end of the poles where I was. I saw the children in the cars just a few minutes previous to the accident. I had not seen any switchmen around there and did not see any until after the accident. I did not see the boy get hurt and do not know whether he was in the car or not when the engine coupled on.

CROSS-EXAMINATION

(By Mr. BATES) :

I was about half way between 11th Street bridge and 15th Street and on the west side of Dock Street. The string of cars extended past where I was working up to about the bridge. When I saw the children they were not walking close to the cars but were right out in the middle of the road. They had been up towards 15th Street and passed me going towards 11th

(Testimony of J. W. CLARK.)

Street and the next I knew of them was when I heard the boy hollering and saw him being dragged by the car.

EDWARD TROW recalled.

(Testimony of Edward Trow)

DIRECT EXAMINATION.

(By Mr. QUICK) :

Q. What were your instructions if any in regard to children about the yard?

A. Why to keep them off, to keep them away.

Q. From whom did you get those instructions?

A. Why we get our instructions from the yard master, our superior officer.

Q. Do you know whether that was instructions given generally to the switchmen?

A. Given to everyone connected with the railroad and working around the tracks.

Defendant rests.

Mr. BATES: No rebuttal.

Mr. QUICK: Defendant moves the Court to instruct the jury to return a verdict in favor of the defendant for the reason that the evidence is not sufficient to submit the case to the jury.

The Court: The motion is denied.

Mr. QUICK: Exception.

Court's Instructions

THEREAFTER, and after argument before the jury by counsel for the plaintiff and defendant, the Court charged the jury as follows:

GENTLEMEN OF THE JURY:

Without burdening you with the formal allegations of the pleadings in this case, I will state to you in general terms that this case is prosecuted upon the theory that for a considerable time before the 28th day of September 1908 persons in considerable numbers, including children and others, were in the habit of going to the cars in the yards of the Northern Pacific Railway Company in this city for the purpose of sweeping up wheat found in the empty cars and carrying it away; that in pursuance of this custom this plaintiff visited the railroad yards on the 28th day of September 1908, and while there was injured through the negligence and carelessness of the defendant and its employees. The defendant on the other hand denies that the plaintiff was there in pursuance of any custom, and alleges that he was there as a trespasser and that he was guilty of contributory negligence. Upon these issues, gentlemen of the jury, I charge you as follows:

It first devolves upon you to determine whether or not the defendant, Northern Pacific Railway Company, or its servants or agents, while engaged in their work for such company, were negligent in the operation of the train of cars as alleged in the complaint, and whether or not such negligence, if any you find, was the proximate cause of the injury complained of, and in order to properly determine such question it will be necessary for you to first determine the duty, if any, which the defendant company owed to the plaintiff, and such questions depend largely upon the

facts and surrounding circumstances. Negligence consists in doing something or failing to do something which a person of ordinary prudence and care would have done or would not have failed to do, under like and similar circumstances. If you find that at the time of the injuries complained of in the complaint, and for sometime prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant's track and sweeping the wheat up and gathering the wheat from in and about said cars, and if the defendant, its servants and employees knew of such custom or by the exercise of ordinary care and observation could have known of it, then I instruct you that the defendant Railroad Company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

You are instructed that in determining whether or not the defendant, its servants and employees were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employees at and about the point where, and the time when the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for

the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars.

In determining whether or not an act committed by a child of the age of this plaintiff at the time of the injury is, or is not contributory negligence, you will take into consideration the familiarity or unfamiliarity of the child with the situation in which he was just prior to the accident, the natural tendency and inclination of a child of that age, the probability, if any, of a child of that age following other and older children into a place of danger without such caution or care as would ordinarily be used by older and more experienced persons; and you are to judge the actions of this plaintiff at and just prior to the injury, not by the standards of care ordinarily exercised by persons of greater age and experience, but by the standards of care ordinarily and customarily used by boys of the age, knowledge, experience, tendency and inclinations of this plaintiff, at the time of the accident, under similar conditions and circumstances.

You will observe, gentlemen of the jury, this case rests entirely upon custom. These tracks and these yards are the private property of the Northern Pacific Railroad Company. It is under no legal obligation to fence them to keep the public out. It is under no legal obligation to employ men to keep people from trespassing on these yards. It is not the general

guardian of children or any other member of the public. It does, however, have certain duties and if it was aware of the general custom of a number of children to visit this yard and it took no steps to prevent it, then it acquiesced in that custom and was bound to recognize conditions as they found them, and was bound to exercise reasonable care in view of the custom which thus existed. If you find that there was no such custom there, then I charge you as a matter of law that this plaintiff was a trespasser and cannot recover. If you find the defendant company exercised reasonable diligence to keep trespassers away from its ground and its tracks, I charge you as a matter of law that it performed its duty to the public, and there can be no recovery here, because in that event this plaintiff would be a trespasser and the defendant would only be liable to him for willful or intentional injury, and there is no such claim here that any such willful or intentional injury was inflicted.

In determining the question of contributory negligence, gentlemen of the jury, it will be necessary for you to determine from the testimony how this accident happened. Some testimony on the part of the plaintiff tends to show that when the car was struck by the engine the boy was thrown out of the box car and got under the wheels. It is for you to say whether that theory of the case is probable or improbable. Was it likely or probable that a person thrown out of the side of a box car would come under the wheels?

On the other hand, gentlemen of the jury, there is testimony on the part of the plaintiff here tending to show that the boy reached in over the rail in order to get a broom, after the front end of the car had been struck by the engine and pushed backward. If he did that it is for you to say whether such an act on the part of a boy 11 years of age was contributory negligence. A boy even of that age is presumed to know that if a train runs over him it will injure him. I am not expressing any opinion on these facts, gentlemen of the jury; that is for your consideration, and your consideration alone, but before you return a verdict for the plaintiff here you must be satisfied by the preponderance of the testimony that the custom existed, and that custom was acquiesced in by the company, and that the railroad company failed to exercise due and reasonable care in view of that custom; and then the plaintiff cannot recover if he himself is guilty of contributory negligence. These are the only instructions I deem it necessary to give you.

You may retire with the bailiff.

Mr. QUICK: Just a moment. While I think the Court touched upon the subject in the instruction I am inclined to think it was not plainly stated to the jury that if they found from the evidence that the defendant exercised ordinary care in endeavoring to keep children and others out of its yards and away from its cars, then it did not acquiesce in the custom.

The COURT: I have so charged the jury, that if they exercise that degree of care they have exercised

their full duty under the law, and would not be guilty of negligence.

Mr. BATES: In regard to the amount of damages, your Honor.

The COURT: Gentlemen of the jury, one moment. On the question of damages, gentlemen of the jury, I charge you as follows:

If you should find for the plaintiff you may fix his damages at such amount as will compensate him for the injuries he has suffered, for the pain and suffering he has endured, if any, up to the present time, and such pain and suffering, if any, which he will probably endure in the future, by reason of his injuries, and also his loss of earning capacity, if any, and also such anguish and humiliation of mind as he may suffer by reason of his present condition in all, however, not to exceed the same asked for in the complaint.

(Whereupon the jury retired to deliberate of their verdict.)

Exceptions

Mr. BATES: The plaintiff excepts to the refusal of the Court to give instructions Number 4, 5 and 6.

Plaintiff also excepts to that part of the Court's instruction in which he said that there was testimony tending to show that the plaintiff reached in over the rail of the track after the front end of the car had been pushed back.

Mr. QUICK: The defendant excepts to instruction number 2 requested by the plaintiff and given

by the Court to the effect that it was the duty of the the defendant, its servants and employees, to except that children or other persons would be in or about the cars or tracks for the purpose of getting wheat, and that it was the duty of the defendant under such circumstances to exercise ordinary care to prevent accidents to such persons, for the reason that said instruction imposes upon the defendant the duty of exercising ordinary care to prevent accidents to trespassers, and would make the defendant liable for an injury received by the plaintiff where the defendant was without knowledge that plaintiff was upon its cars or in a place of danger.

THEREAFTER, and on the 29th day of September 1911, after argument upon the motion for a new trial and for judgment notwithstanding the verdict, the Court ruled as follows:

The COURT: I think as a matter of fact in this case it was established beyond controversy that it was customary for children to go there for that purpose. There was no dispute in the testimony on that point, and I think also the testimony on the point was sufficient to charge the company with notice of that fact.

(Discussion)

The COURT: I do not know what it is leading to exactly. I do not know where this is going to stop, but during this present term of Court verdicts were returned by the jury aggregating more than twenty thousand dollars for injuries to persons where they had, in my opinion, no conceivable right to be, and I

am satisfied the jury imposes a much higher degree of care upon railroad officials than they themselves would exercise.

I am going to overrule this motion for two reasons. The first reason is I think it will be affirmed; the second reason, the railroad company is far better able to carry it to the higher Court than this one-legged boy.

Mr. QUICK: The Court will give us an exception to the ruling.

The COURT: Exception allowed.

Verdict

THEREAFTER the jury returned into Court their verdict in favor of the plaintiff in the sum of \$4000.00.

Now in the furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause and prays that the same may be settled, allowed, signed and certified by the Judge, as provided by law, and filed as a Bill of Exceptions.

GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for Defendant.

Service of the within Bill of Exceptions is hereby admitted this 16th day of November, 1911.

JOHN T. CASEY,

HEBER McHUGH,

CHARLES O. BATES,

Attorneys for Plaintiff.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT,

Western District of Washington

NOV 16 1911

JAMES C. DRAKE, Clerk.

Albert P. Close, Deputy.”

Order Settling Bill of Exceptions

Now on this 5 day of December, 1911, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said cause, defendant appearing by J. W. Quick, its attorney, and the plaintiff appearing by John T. Casey, Herbert C. McHugh and C. O. Bates, his attorneys, and appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiff within the time provided by law, and that no amendments have been suggested thereto and that counsel for plaintiff have no amendments to propose, and that both parties consent to the signing and settling of the same, and that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part

of said Bill of Exceptions and the Clerk of this Court is hereby ordered and instructed to attach the same thereto;

Thereupon, upon motion of J. W. Quick, Esquire, attorney for defendant, it is hereby

ORDERED that said proposed Bill of Exceptions be and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the Clerk of this Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

FRANK H. RUDKIN,
Judge.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT,
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Assignment of Error

Comes now the defendant, the Northern Pacific Railway Company, and files the following Assignments of Error upon which it will rely upon its prosecution of its Writ of Error in the above entitled

matter in the United States Circuit Court of Appeals for the Ninth Circuit for relief from the judgment rendered in said cause.

I.

The Honorable Circuit Court erred in admitting incompetent and immaterial evidence prejudicial to the defendant as follows:

The following evidence of the plaintiff, to-wit: "We went down the steps at the 11th Street bridge and we went up the dock a ways and then came back and met a man there. He had on a blue jacket and overalls and he says: "Good morning." He had hold of a piece of iron which had kind of a round iron on the top and he was turning that around. I did not know what it was at the time, but I have since learned it was a switch. He said "good morning" to us and we said "good morning," and he asked what we came for and we told him we came for wheat, and he says to us "there is lots of it over there in them cars" and he pointed his finger and said "you better hurry over before the other boys and girls get it."

The following evidence of the witness Maggie Slabb, to-wit:

"There was a man there on the tracks under the bridge turning something and says: "Hello boys and girls," and we says: "Hello" and he says: "what are you after" and we says: "We are after wheat," and he pointed his hand and shows us some cars on the track there and said there was lots of wheat we could get there because other people were getting some there too."

The following evidence of the witness Mark Maloney, to-wit:

“Q. When you were down there getting wheat before and you saw these railroad men there did you have anything to say to them about getting wheat?”

Mr. QUICK: We object to that as incompetent, irrelevant and immaterial.

Mr. BATES: The only object is to show that they knew these boys were there to get wheat.

The COURT: You may ask him whether they objected or not.

Mr. QUICK: We except to the ruling.

A. No, sometimes they told you to go ahead where there was some wheat. Told you where there was some. Pointed it out to you.”

The following evidence of the witness Edwin Wolfe, to-wit:

“I had been going down in the railroad yards for about a year before Tony was hurt, whenever my mother would let me, which would be four or five times a week sometimes, and other times not more than once a week. I went down there to get wheat.

Mr. QUICK: We object to this line of evidence.

The COURT: Objection will be overruled. The only purpose of this testimony is to show knowledge on the part of the company, and it is admitted for that purpose. The defendant is allowed an exception.

When I would go down in the yard to get wheat before Tony was hurt, I have seen other children and men down there getting wheat. Sometimes there would be one, two or three and sometimes none. I

would see the switchmen down there handling the cars and they have told me—

Mr. QUICK: I object to that as incompetent.

Mr. BATES: I do not want to get over the rule, but I want to show that these men were after wheat in the car that is all.

Mr. QUICK: If they did know it, it would not bind the company.

The COURT: The objection is overruled and exception allowed.”

II.

The Honorable Circuit Court erred in overruling the motion of the defendant for a non-suit made at the close of the evidence of the plaintiff.

III.

The Honorable Circuit Court erred in overruling the motion of the defendant for an instructed verdict made at the close of all the evidence in the case.

IV.

The Honorable Circuit Court erred in instructing the jury as follows:

“If you find that at the time of the injuries complained of in the complaint, and for sometime prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant’s track and sweeping the wheat up and gathering the wheat from in and about said cars, and if the defendant, its servants and employees knew of such custom or by the exercise of ordinary care and observation could have known of it, then I instruct you that the

defendant Railroad Company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

You are instructed that in determining whether or not the defendant, its servants and employees were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employees at and about the point where, and the time when the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars."

V.

The Honorable Circuit Court erred in overruling the motion of the defendant for judgment notwithstanding the verdict.

WHEREFORE defendant, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington, Western Division, be reversed and

that such directions be given that full force and efficiency may inure to the defendant by reason of its defense to said cause.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

(Acceptance of service.)

(Endorsed):

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Petition for Writ of Error

The defendant, the Northern Pacific Railway Company, feeling itself aggrieved by the verdict of the jury and the judgment entered therein in the above entitled cause, comes now by its attorneys and petitions this Honorable Court for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish

upon said Writ of Error and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Order Allowing Writ of Error

Upon motion of J. W. QUICK, attorney for the above named defendant, and upon filing a petition for a Writ of Error and Assignment of Errors as required by law, it is hereby

ORDERED, that a Writ of Error be and is hereby allowed to have reviewed in the Honorable United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein; and it is further ordered that the amount of bond on said Writ of Error is hereby fixed at the sum of FIVE THOUSAND Dollars to be given by the defendant, and on the giving of said bond the judgment heretofore

rendered will be superseded pending the hearing of of said cause in the Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF, the above order is granted and allowed, this 5th day of December, 1911.

FRANK H. RUDKIN,
Judge.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS:

That we, Northern Pacific Railway Company, a corporation, as principal, and National Surety Company, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the plaintiff in the above action in the sum of Five Thousand Dollars (\$5,000.00), for which sum well and truly to be paid to the plaintiff, his executors, administrators and assigns we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of December, A. D. 1911.

The condition of this obligation is such that whereas, the above named defendant, Northern Pacific Railway Company, a corporation, has sued out a Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reserve the judgment in the above entitled cause by the Circuit Court of the United States for the Western District of Washington, Western Division, and whereas, the said Northern Pacific Railway Company desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals, for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above named Northern Pacific Railway Company, a corporation, shall prosecute said Writ of Error to effect and answer all costs and damages awarded against it, if it fail to make good its plea, then this obligation shall be void; otherwise the Court may enter summary judgment against said Northern Pacific Railway Company and said surety for the amount of such costs and damages awarded against said Northern Pacific Railway Company and this obligation to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY.

(SEAL.)

BY GEO. T. REID,

Its Attorney.

NATIONAL SURETY COMPANY.

By W. H. OPIE,

Attorney in Fact.

Approved this 6th. day of December, 1911.

FRANK H. RUDKIN,

Judge.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT

Western District of Washington

DEC 6 1911

JAMES C. DRAKE, Clerk.”

Writ of Error

UNITED STATES OF AMERICA,
THE PRESIDENT OF THE UNITED STATES
OF AMERICA, TO THE HONORABLE THE
JUDGES OF THE CIRCUIT COURT OF THE
UNITED STATES FOR THE WESTERN DIS-
TRICT OF WASHINGTON, WESTERN DIVIS-
ION.—GREETING.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between the Northern Pacific Railway Company, a corporation, Plaintiff in Error, and Tony Curtz, a minor by Agnes Curtz, his Guardian ad litem, Defendants in Error, a manifest error hath happened to the damage of the said plaintiff in error, as by its answer appears, and we being willing that error, if any hath happened should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, under your seal, dis-

tinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit in thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

WITNESS THE HONORABLE EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 6th. day of December, A. D. 1911, together with seal of said Court.

(SEAL) JAMES C. DRAKE,
Clerk of the Circuit Court of the United States for
the Western District of Washington.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 7 1911
JAMES C. DRAKE, Clerk.”

Citation

THE UNITED STATES OF AMERICA,
THE PRESIDENT OF THE UNITED STATES
OF AMERICA, TO TONY CURTZ, a minor, by
AGNES CURTZ, his Guardian ad litem, Defend-
ants in Error.—GREETING.

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the Court room of said Court, in the City of San Francisco, and State of California, within thirty days from the date of this Citation, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Washington, Western Division, wherein, Northern Pacific Railway Company, a corporation, is plaintiff in error, and Tony Curtz, a minor by Agnes Curtz, his Guardian ad Litem, is defendant in error, to show cause if there be any, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD
DOUGLASS WHITE, Chief Justice of the United
States, and the seal of said Court, this 6th. day of
December, A. D. 1911.

(SEAL.)

FRANK H. RUDKIN,

Judge of the United States District Court for the
Western District of Washington, presiding in Circuit
Court of the United States for the Western District
of Washington.

Service of above accepted this 7th. day of December, A. D. 1911.

BATES, PEER & PETERSON,
Attorneys for Plaintiff.”

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 6 1911
JAMES C. DRAKE, Clerk.”

Clerk's Certificate


UNITED STATES OF AMERICA, WESTERN
DISTRICT OF WASHINGTON.—ss.

I, JAMES C. DRAKE, Clerk of the United States Circuit Court for the Western District of Washington, do hereby certify that the foregoing papers are a true and correct copy of the record and proceedings in the case of TONY CURTZ, a minor, etc., plaintiffs, versus NORTHERN PACIFIC RAILWAY COMPANY, a corporation, defendant, as the same remain on file and of record in my office.

I further certify that I hereto attach and herewith transmit the original Citation and Writ of Error issued in said cause.

I further certify that the cost of preparing and certifying the foregoing record to be the sum of \$104.00, which sum has been paid to me by the attorneys for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of this said Court, at the City of Tacoma, in said District, this 22nd day of December, A. D. 1911.

A handwritten signature in cursive script, reading "James B. Smith". The signature is written in dark ink and features a large, sweeping loop at the beginning of the name.

CLERK.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Plaintiff in Error,

vs.

TONY CURTZ, a minor, by AGNES
CURTZ, guardian *ad litem*,

Defendant in Error.

No. 2098.

UPON WRIT OF ERROR FROM THE UNITED
STATES CIRCUIT COURT, FOR THE
WESTERN DISTRICT OF WASH-
INGTON, WESTERN
DIVISION.

BRIEF OF PLAINTIFF IN ERROR

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,

Attorneys for Plaintiff in Error.

17 Headquarters Bldg., Tacoma, Wash.

The Bell Press, Printers.

FILED

JAN 31 1917



IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Plaintiff in Error,

vs.

TONY CURTZ, a minor, by AGNES
CURTZ, guardian *ad litem*,

Defendant in Error.

No. 2098.

UPON WRIT OF ERROR FROM THE UNITED
STATES CIRCUIT COURT, FOR THE
WESTERN DISTRICT OF WASH-
INGTON, WESTERN
DIVISION.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE FACTS.

This action is brought by Tony Curtz, by his mother, Agnes Curtz, his guardian *ad litem*, to recover damages for an injury received on the 12th day of September,

1908, while sweeping wheat in a car standing on a switch track in defendant's railroad yards in the city of Tacoma.

These railroad yards extend along the waterfront a distance of six or seven miles and occupy a space bounded by the water on the east side and a bluff on the west side, the city being built on the bluff above the tracks. This space between the water and the bluff is of varying width, so that in the narrow places there are few tracks, while where the space is wider there are a great many tracks.

Along the waterfront are constructed docks and warehouses, then next to the warehouses on the side away from the water is a street, and the yard and tracks of the defendant company are west of the street, between the street and the bluff. The situation is best described by the witness J. P. Farley, as follows:

“In going to the docks we usually drive down 21st street or 15th street to as far north as 9th street. We drive from 21st street to 15th street on the brick pavement and from 15th street follow Dock street straight north. The Municipal Dock is the first one north of 11th street, and then the Alaska Pacific Dock, then the London Dock, then the Balfour-Guthrie Grain Warehouses and then the Eureka Dock. Between 11th street and 15th street there are six tracks. The one on the east side crosses Dock street at the 11th street bridge, then runs on the east side of Dock street close up to the warehouses. The waterfront is east of Dock street. I would be down there some three or four times a day with my team, and I have seen men and children getting wheat out of the cars quite frequently.

The yards are on the west side of Dock street, and they run from Prescott clear to the Smelter, a distance

of six or seven miles, but the most tracks are between 11th and 7th streets. At the foot of 9th street there are probably 50 or 60 tracks, and usually five or six switch engines are working in there and the switchmen are kept quite busy with their work. I never saw them order children away, but they may have done so."

Record, pp. 38-39.

At 11th street an overhead bridge is constructed over the tracks.

There is a switch track which leaves the main line at 15th street, running north on a curve to the east between the main line track and Dock street until near 11th street, where it crosses Dock street to the east side thereof; running thence north along the east side of Dock street next to the grain warehouses mentioned by the witness Farley. This track is spoken of as the "grain lead," and is used in switching cars loaded with grain to these warehouses. When the cars are unloaded they are sometimes shoved south on this track across Dock street at 11th street and left standing on the curve between 11th and 15th streets. At the time of the injury to the plaintiff there was a string of eighteen cars standing on this portion of the track, the north end of the string being about seventy-five feet south of 11th street and the south end just in the clear of the main line at 15th street.

The witness Raymond describes it:

"Q. Was there a string of cars reaching from near 11th street south to about 15th street?"

A. There was a string of cars. I was pretty near up to the end of the cars when the engine hitched onto them,

and that was, I should judge, about 75 feet south of the 11th street bridge.

Q. And the other end of the string was down—it was somewhere—

A. It was somewhere in the neighborhood of the Pacific Fruit, along in there, about 15th street. It was over in the yards.

Q. That would be a distance of about six or seven hundred feet, wouldn't it?

A. I think it is in the neighborhood of five or six hundred feet.”

Record, pp. 40-41.

Witness Edward C. Trow testified that there were about eighteen cars in the string, and that these cars were standing on a curve, the inside of the curve being the west side of the track, which is the side away from the water, and that they came in on this track with the engine at 15th street and coupled onto the south end of the string of cars.

Record, p. 53.

Switchman Housman testified:

“The cars were standing on a switch track which connects with the main track close to 15th street, and the south end of the cars were just in the clear at 15th street. We came in with the engine from 15th street switch and I coupled onto the cars.”

Record, p. 56.

The defendant in error, at the time he was injured, was eleven years old, and lived on Yakima avenue, about a mile from the place of injury. In the morning his mother left home for the purpose of “nursing a sick

lady who lived across the street," and testified: "I left home about eight o'clock in the morning of September 12, 1908, and at that time Tony was in the yard trying to cut wood and kindling, which he was carrying upstairs where we lived, as we lived on the second floor of the house. His two smaller brothers and Maggie Slabb, his cousin, were with him." (Record, p. 23.) The Slabbs lived on the first floor of the same house.

Tony testified that after his mother went away his cousin, Maggie, asked him if he wanted to go down after wheat with them, and that he and Maggie and her younger brother took a little red wagon and a cart, and "we took brooms with us, and I had a broom that the handle had been broken off so that the handle was about a foot and a half long, and I was using this to sweep up the loose wheat in the car. I got this broom out of the barn where we lived." (Record, p. 27.) They went down the steps at 11th street bridge into the railroad yards, and from there went over to these cars standing on the switch south of the 11th street bridge and west of Dock street. "We walked up the dock a little ways. We did not see anything up there and we started back. * * * The door of the car was in the side of the car and we left the wagon and cart at the side of the car, about two feet from it. The cars were this side, that is, south of the 11th street bridge, and about as far as across the street." They climbed into the cars, Maggie getting into one car and Tony into another, and, while they were sweeping the loose wheat up from the floor of the car, the cars were moved by the engine coupling onto the south end of the string, the plaintiff saying: "I know that the

engine gave the car a big jerk and knocked me right out and I did not know anything at all after that until I found myself in the hospital and my leg had been taken off." (Record, p. 26.) He further testified that the car he was in was the end car on the north end of the string of cars standing there, and that he had not seen any engine or cars moving about there, and that he was going to take the wheat home to feed the chickens. (Record, pp. 26-27.)

The evidence of the plaintiff is corroborated by his cousin, Maggie Slabb, who further testified that "he left his wagon right in front of the car door and I left mine in front of the door of the car about two or three feet away from the door. I think it was on the water side. * * * When we went down the steps onto the tracks we then went south about the distance of across the street from the bridge to the cars. * * * I never saw any engine and did not see any cars moving. * * * We went down to where the cars were and I got up in a car, but I do not know whether my brother got into one or not, and I did not see what car Tony got into. I do not remember how I got into the car, but I climbed up into the car some way, but there was no ladder there. * * * We were getting the wheat for ourselves, and I do not know who the wheat belonged to. * * * There was not very much wheat in the car. We had just swept it up when the train bumped. I had a little dustpan full, that is all." (Record, pp. 28, 29, 30.)

The only eyewitness to the accident was Mr. F. L. Raymond, a teamster for the Tacoma Truck Company,

who had just finished loading at one of the warehouses near 11th street and was driving south on Dock street, and he described the accident as follows:

“When I first seen the boy I seen him when the cars hit. When I first seen him, as near as I can remember now, he was beside the train, but when the engine hit he got down on his hands and knees and crossed the rail right in front of the rear trucks, on the east side of the car, and picked up either a broom or a shovel, a short-handled broom or shovel, just as the train started, and when the train started I am pretty sure the wheels did not run over the boy because there was no blood there. As near as I can figure it out, there is one of the bolts that comes through the bolster that caught in his clothes and jerked him along and rubbed him on the ties and broke his leg and mangled it all up. * * *”

Record, pp. 42-43.

Then, in answer to questions propounded by a juror, this witness testified:

“Q. You saw the train when it hooked onto the car, when it made the coupling?

A. I saw the car at this end move.

Q. You saw it when it made the coupling?

A. Yes.

Q. And you saw the boy at the same time on the ground?

A. Yes, sir.

Q. You did?

A. Yes.

Q. Then he could not have been in the car when the coupling was made?

A. I do not think he could.

Q. He was stooping over?

A. After they had coupled the cars, as near as I can figure it, after they had coupled onto the cars, he went to get his broom, not thinking about the cars starting up, went to get his broom for fear he would lose it, as near as I can see; and he crawled over and reached in front of the rear trucks, and just as the car started he threw himself around with his broom or shovel or whatever it was in his hand, and the bolt that is below the bolster caught in his clothing and dragged him and crushed the leg all along there. The switch crew and myself examined the track and I could see no blood on the rails or on the car where the wheel had run over him.

Q. That was just an ordinary coupling, was it?

A. That was just an ordinary coupling that they make every day."

Record, pp. 44-45.

The witness J. W. Clark was working for the telephone company, loading poles on a wagon, at the time of the accident. These poles were on the west side of Dock street and between Dock street and the track on which the cars were standing. He had noticed the plaintiff and his two cousins going north along Dock street and passed where he was working about fifteen minutes before the accident, and the first he knew of the accident was when he heard persons hollering and looked up and saw the plaintiff being dragged by the car. Prior to that he had not seen any switchmen around there, and the switching crew were on the other side of the cars.

Record, p. 58.

Switch Foreman Trow testified: "The track these cars were standing on is on a curve, the inside of the curve

being the west side of the track, which is the side away from the water. It is the duty and custom of switchmen to work on the inside of the curve, so that they can see the cars the full length of the string in order to know that they are all coupled together and move when the engine starts to pull out. We could not see along the opposite side of the string of cars, as our view would be shut off by the body of the cars. Nor could we have seen had we been on the other side, on account of the curve, without going across Dock street toward the water. I had not seen any children about the cars before that time and did not know that any were there." (Record, pp. 53-54.) Again: "There were none of my crew on the water side of the train on account of the curve, and if they had been they could not have seen the rear cars without going across Dock street over to the bay side. This track does not run in Dock street, but parallels the street and then crosses it on an angle up at the 11th street bridge. I do not think you could see the north end of the cars by going out to the middle of Dock street. * * * It is customary in switching in the yard for you to get on the side where you can see the rear car. It is not customary to walk back, because there is not supposed to be anybody underneath or around the cars unless there is a blue flag placed there by the car men. That signifies there is a man about the car or underneath, but in the yards it is customary to go and couple on at any time during the day or night and start the movement of the cars without going back. The only occasion or reason a person would go back was simply because the cars were not coupled

together. If you can see the rear end coming, that is sufficient. But if it is dark and a man cannot see them, a man goes back to be sure he gets all the cars." (Record, pp. 55-56.)

The evidence of Trow is corroborated by switchmen Housman and Hughes, who were the other two members of the crew handling these cars. All of them came in with the engine from the south, and none of them were near the plaintiff at or before he was injured, or knew that the plaintiff or any other children were in or around the cars.

It was shown by the evidence of the witness Cumming that a special watchman is put on duty by the defendant during the season of the year when grain is being handled for the purpose of keeping unauthorized persons out of the yards and away from the cars. "I put a special watchman on during this season of the year when wheat is coming in, in addition to the regular watchman, and at the time this boy was hurt I had a man by the name of F. K. Wiley especially employed and instructed to keep small boys out of the yards and from jumping on moving trains, etc. * * * Mr. Wiley was on during the grain season of 1907 and 1908. During that time we had two watchmen in the Moon Yard and one at the head of the bay.

Q. And what were your instructions to them in regard to children found in the yard?

A. To arrest them if they found them taking wheat from whole sacks or knifing the sacks. Sometimes they would knife the sacks and let the wheat run out, and come back and claim that they found it on the ground,

and so forth. I especially instructed them to keep these boys out for fear of any accident.”

Record, p. 52.

Mr. A. A. Dikeman, foreman for the Balfour-Guthrie Warehouses, which are located north of 11th street, testified:

“I have repeatedly ordered boys away from our premises and away from cars that were unloaded, and I have given orders to our men who were working there that when boys came to order them away and not allow them there at all. I have done this ever since I have been foreman.”

Record, p. 51.

The plaintiff and his cousin, Maggie Slabb, were permitted to testify, over the objection and exception of the defendant, to a conversation claimed to have been held between them and a man standing at a switch stand under the 11th street bridge when they first went down onto the tracks. This man they said wore a blue jacket and overalls, and appeared to be turning a switch, and directed them to the cars for the purpose of getting the wheat. This evidence will be set forth hereafter in the assignment of errors and discussed later in this brief.

At the close of the plaintiff's evidence, the plaintiff in error challenged the sufficiency of the evidence by a motion for a non-suit, which motion was overruled and an exception allowed.

Record, p. 50.

At the close of all the evidence in the case, the plaintiff in error moved the court for an instructed verdict,

which motion was denied and an exception allowed.

Record, p. 59.

A verdict was returned by the jury in favor of the defendant in error, and the plaintiff in error, within the time provided by law, filed its motion for judgment *non obstante veredicto*. (Record, pp. 18-19.) Which motion was by the court denied. (Record, p. 20.)

ASSIGNMENTS OF ERROR.

The following errors are assigned:

I.

“The Honorable Circuit Court erred in admitting incompetent and immaterial evidence prejudicial to the defendant, as follows:

“The following evidence of the plaintiff, to-wit: ‘We went down the steps at the 11th street bridge and we went up the dock a ways and then came back and met a man there. He had on a blue jacket and overalls, and he says, “Good morning.” He had hold of a piece of iron which had kind of a round iron on the top, and he was turning that around. I did not know what it was at the time, but I have since learned it was a switch. He said “good morning” to us, and we said “good morning,” and he asked what we came for, and we told him we came for wheat, and he says to us, “there’s lots of it over there in them cars,” and he pointed his finger and said, “you’d better hurry over before the other boys and girls get it.”’

The following evidence of the witness, Maggie Slabb, to-wit:

“There was a man there on the tracks under the bridge turning something, and says: ‘Hello, boys and

girls,' and we says, 'Hello,' and he says, 'What are you after?' and we says, 'We are after wheat,' and he pointed his hand and shows us some cars on the track there and said there was lots of wheat we could get there because other people were getting some there, too.'

The following evidence of the witness Mark Maloney, to-wit:

"Q. When you were down there getting wheat before, and you saw these railroad men there, did you have anything to say to them about getting wheat?"

MR. QUICK: We object to that as incompetent, irrelevant and immaterial.

MR. BATES: The only object is to show that they knew these boys were there to get wheat.

THE COURT: You may ask him whether they objected or not.

MR. QUICK: We except to the ruling.

A. No; sometimes they told you to go ahead where there was some wheat. Told you where there was some. Pointed it out to you."

The following evidence of the witness Edwin Wolfe, to-wit:

"I had been going down in the railroad yards for about a year before Tony was hurt, whenever my mother would let me, which would be four or five times a week sometimes, and other times not more than once a week. I went down there to get wheat."

MR. QUICK: We object to this line of evidence.

THE COURT: Objection will be overruled. The only purpose of this testimony is to show knowledge on the part of the company, and it is admitted for that purpose. The defendant is allowed an exception.

“When I would go down in the yard to get wheat before Tony was hurt I have seen other children and men down there getting wheat. Sometimes there would be one, two or three, and sometimes none. I would see the switchmen down there handling the cars, and they have told me——”

MR. QUICK: I object to that as incompetent.

MR. BATES: I do not want to get over the rule, but I want to show that these men were after wheat in the car, that is all.

MR. QUICK: If they did know it, it would not bind the company.

THE COURT: The objection is overruled and exception allowed.”

II.

The Honorable Circuit Court erred in overruling the motion of the defendant for a non-suit made at the close of the evidence of the plaintiff.

III.

The Honorable Circuit Court erred in overruling the motion of the defendant for an instructed verdict made at the close of all the evidence in the case.

IV.

The Honorable Circuit Court erred in instructing the jury as follows:

“If you find that at the time of the injuries complained of in the complaint, and for some time prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant’s track and sweeping the wheat up and gathering the wheat from

in and about said cars, and if the defendant, its servants and employes knew of such custom, or by the exercise of ordinary care and observation could have known of it, then I instruct you that the defendant railroad company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

“You are instructed that in determining whether or not the defendant, its servants and employes were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employes at and about the point where, and the time when, the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars.”

V.

The Honorable Circuit Court erred in overruling the motion of the defendant for judgment notwithstanding the verdict.

ARGUMENT AND AUTHORITIES.

Assignments of Error numbers 2, 3 and 5 relate to the sufficiency of the evidence to sustain the verdict and judgment. We will, therefore, discuss this proposition first, for the reason that if our contention is sus-

tained a consideration of the other assignments of error will be rendered unnecessary.

The defendant in error at the time he was injured was a trespasser for the following reasons:

First. He was not on the premises and in the cars of the Railway Company for the purpose of transacting any business with the Railway Company or its agents.

Second. He was not there by the invitation, permission or acquiescence of the Company.

Third. He was there for an unlawful purpose.

The defendant in error and his companions had gone into the railroad yards upon the private premises of the Railway Company, and into its cars, for the purpose of obtaining wheat which they knew did not belong to them and which they were going to carry home to feed to their chickens. It will doubtless be contended by counsel for defendant in error here, as they did before the jury, that the Railway Company did not do all that it could have done to prevent persons from going into its yards and upon its premises for the purpose of stealing wheat, but whether it did all that it could have done is not the test for determining acquiescence. If it objected to the presence of these persons and made any effort to keep them away, then it did not acquiesce, and the persons thus entering upon its premises are trespassers. Again, if a person goes upon the premises of another for an unlawful purpose—to commit a crime, as in this case—then as a matter of law there can be no acquiescence and such a person is a trespasser. There

is no dispute but that the Railway Company employed an extra watchman in its yards during what is termed the "grain season," whose duty it was to keep persons out of the yards and prevent the larceny of wheat, and who was especially instructed to keep children away from the cars. This act of the Company refutes any possible suggestion of acquiescence on its part. The fact that switchmen engaged at work in the yards did not chase persons away is accounted for in the evidence by the fact that the switchmen are very busy in the performance of their duties. In a large terminal yard such as this one, extending a distance of six or seven miles along the waterfront, where a number of switching crews are constantly busy moving the hundreds of freight cars that are handled every day in these yards, the Company owes the duty to those engaged in shipping and receiving freight to handle these cars with reasonable dispatch and promptness, besides making up its trains in the yards. The trainmen and switchmen, therefore, can not be expected or required to leave their work for the purpose of chasing people out of the yards or examining every car in a long string to see if some trespasser is in the car stealing wheat or some other article of shipment.

The evidence shows there were eighteen cars in this string of cars standing on the track, which would make the string about 650 feet long. The switching crew came in at the south end and coupled onto the cars and started to pull them out. These children were in the cars near the north end of the string, and entered the same from the east side while the switchmen were all

on the west side of the cars, which would place them on the inside of the curve of the track. They did not see or know, and could not see or know, that these children were in the cars unless they waited until one of the switchmen could walk almost the full length of the string and make an examination of each car for the purpose of determining whether some unauthorized person was trespassing therein. The little wagon and cart which these children had with them was also on the east side of the cars and within two or three feet of the cars, so that they could not be seen and were not seen by the switchmen. Even the two witnesses who were working near these cars did not know that the children were in the cars. The witness Raymond testified that he was loading at the dock under the Eleventh street bridge, and said:

“A. I had been there, I could not say. I think it was my second trip that morning. I make three trips in the forenoon, and that was my second trip. I do not remember how long I had to wait before I got my load. There was a couple of teams ahead of me. We have to take our turn. I do not know just exactly how long that was.

Q. Had you seen Tony Curtz before he got hurt?

A. No, sir. I did not see him while I was loading there. The first I seen of him was when the train hooked on.

Q. Where were you loading?

A. I was back in under the 11th street bridge. There are two places we can back in, and I was in the middle place on the left-hand side facing south, the middle place I got my load of sugar.

Q. Had you seen any children around there?

A. I had not seen any children around there at that time.

Q. Did you notice any switchmen around there?

A. I did not notice any switchman, no, sir."

Record, pp. 41-42.

The witness Clark, who was loading poles which were between the cars and Dock street, and about 150 or 175 feet from where the accident occurred, testified:

"When I saw the children they were not walking close to the cars, but were right out in the middle of the road. They had been up towards 15th street and passed me going towards 11th street, and the next I knew of them was when I heard the boy hollering and saw him being dragged by the car."

Record, pp. 58-59.

He did not know that they had entered any of the cars.

In the late case of *Hammers vs. Colorado Southern N. O. & P. R. Co.*, 55 So. 4, from the Supreme Court of Louisiana, the plaintiff with others went to the street crossing in the town of Eunice where the passenger trains usually stopped for receiving and discharging passengers, to meet a friend expected on the train, and as the day was warm and there was no depot or other shelter provided the persons awaiting the arrival of the train "sought protection against the hot sun that was pouring down wherever they could find it. A line of freight cars, with no locomotive attached, stood there upon the side track, alongside of the main track, the rear end of the hindmost car being on a line, or about

on a line, with the property line of Laurel street, or perhaps impinging a few feet upon what would have been the sidewalk, if there had been one. To get out of the sun plaintiff went under this end car and took a seat upon the rail just back of the front truck of the car, close enough to the wheel for him to have leaned against it." Others of his companions seated themselves on cross ties or stretched themselves on the grass, and while thus located an engine and cars backed in on the sidetrack and coupled on to the other end of this line of freight cars and the plaintiff was injured thereby. The court, in disposing of the question, said:

"We do not think that exercise of due care on the part of a railroad company requires it to look under its stationary cars, before moving them, to ascertain whether somebody is not sitting on one of the rails. The learned counsel argue the case as if someone at the crossing, or someone using the crossing, or the space round about it, in the legitimate, ordinary way, had been injured. But plaintiff was not at the crossing. He was close to the front truck of the car, and the car was 36 feet long, and he was using neither the crossing nor the space about it in the legitimate, ordinary way. He was in a position where a lookout on the cars could not possibly have discovered him. And, we repeat, it is not the duty of a railroad company, before attempting to move a stationary car on a sidetrack, to look under the car to ascertain whether somebody may not be under it."

The same rule is stated by the Supreme Court of Missouri in *Williams et ux. vs. Kansas City, S. & M. R. Co.*, 9 S. W. 573, where a boy twelve years old was playing in defendant's switch yard and was injured when a coupling was made on a string of freight cars

while the boy was sitting on the brake of one of them. The court said:

“The principles of law which are to be applied in cases of this kind are not to be confounded with those which are applied where the party is on the car or track by right, nor with those which regulate the duties of railroad corporations at public crossings, or where the company has violated some statutory or municipal regulation. It has been held in a number of cases, where the party injured or killed was wrongfully on a railroad track—was a trespasser—that, in order to make the defendant liable, it must appear that the proximate cause of the injury was the omission of the defendant to use reasonable care to avoid the injury, after becoming aware of the danger to which the injured party was exposed. *Isabel vs. Railroad Co.*, 60 Mo. 475; *Harlan vs. Railroad Co.*, 64 Mo. 480; *Zimmerman vs. Railroad Co.*, 71 Mo. 477; *Yarnall vs. Railroad Co.*, 75 Mo. 583; *Maher vs. Railroad Co.*, 64 Mo. 267. While the evidence shows that the brakeman when on the ground at the north end of the switch, and when on top of the car, signaled the engineer to stop, yet it is clear he gave the signal, not because he saw the boy on the car or track, but because he supposed the box cars were to be placed on the side-track and not run back on the main track. There is, indeed, nothing to show that either he or the engineer saw or knew that the boy was on or about the flat cars. Not a witness saw the boy on the car at the time of the accident, though some of them were in a more favorable position to see him than the brakeman. There is no evidence upon which to base a liability on the ground that the defendant’s servants saw or knew of the danger to which the boy was exposed, and for this reason the plaintiff’s second instruction should not have been given. Indeed, the third instruction, given at the request of the defendant, told the jury that there was no evidence that defendant’s servants saw or knew that he was on the car or track.”

The same court in the later case of *Rushenberg et al. vs. St. Louis, I. M. & S. Ry. Co.*, 19 S. W. 216, in an action for personal injuries resulting in the death of a child eight years old, who was gathering up pieces of ice which had fallen under and around cars standing on a sidetrack which had been loaded with ice, and was under the car, which was one of a long string of cars, when the string was moved by other cars being bumped against it. The court held:

“The operation of railroad trains would certainly be rendered impracticable if it should be declared to be the law that before a freight train could be moved or its cars backed up against one another an inspection would first have to occur of every car to see if by any possibility any trespasser was in a situation to be injured in case the cars were moved.”

This case is very similar to the case at bar, as it was claimed that the children were attracted to the cars by reason of the pieces of ice which had fallen on the ground and which, as a matter of fact, would be very attractive to children, but, as in the case at bar, they were where they had no lawful right to be. They were trespassing and the railway company owed them no duty until their presence was known to the employes engaged in moving the cars. As said by the court in this case, the business of a railway company would be rendered impracticable if, before a string of eighteen cars could be moved in its yards, it should be incumbent on the company to have someone personally inspect each of the cars to see that there were no trespassers thereon. Such a duty would render the handling of cars in a large terminal yard impossible without the employ-

ment of a small army of men, especially in a city where there are probably ten thousand children, many of whom run the streets without that parental control and supervision they should receive. Such a rule would make the railroad company the guardian of such children.

In *Wagner vs. Chicago & N. W. Ry. Co.* (Iowa), 98 N. W. 141, a child was playing under the cars in the switch yard when the cars were suddenly moved without warning and without knowledge on the part of the trainmen that the child was under the cars, and it was almost instantly killed. The court said:

“It must always be remembered, in cases of this kind, that a railway company is not an insurer against accidents. Recovery can be had from it when, and only when, it has neglected some duty which it owed to the individual who is injured. Two things are necessary to make out a cause of action—one, a right in the plaintiff, and the other some wrong or breach of duty on the part of the defendant. Railway tracks are known places of danger. They are not made for the use of foot passengers, and ordinarily a railway company has the right to assume that they will not be so used. It certainly may assume that no children are playing about or under its cars, and unless it knows or has reasonable grounds to anticipate their presence it is not bound to look out for them. When it grants a license it is only bound to the extent of its grant.”

The same rule is stated by the Supreme Court of Indiana in *Jordan vs. Grand Rapids & I. Ry. Co.*, 70 N. E. 524.

“A boy eight years of age, who climbed on a box car to look at a sale of stock in an adjacent stockyard, was a trespasser.

A railroad company is not required, before moving cars standing on a sidetrack, to examine them to prevent injury to possible trespassers thereon.

A railroad company is not liable for injuries to a trespasser unless the injuries are purposely or recklessly inflicted, or it has knowledge of the injured person's danger in time to have prevented the injury."

In *McDermott vs. Kentucky Cent. Ry. Co.* (Ky.), 20 S. W. 380, where a child about eight years of age was injured by the moving of cars in the yard of the company where it and other children were playing, the court said:

"Accordingly, as moving engines and cars to and fro in the yard of a railroad company is indispensable to safe and proper conduct of its business, it should be no more obliged to specially look out for presence of those who may go there without right than for trespassers on the main track, away from the yard; for to require the bell rung or whistle blown at every movement of an engine in the company's yard to and from a coal chute, water tank or turntable, however slowly or short the distance it might have to go, or that an extra employe be placed upon every backing engine simply to warn or look out for presence of persons having no right, or reasonably expected to be there, when not at all necessary for safety of persons or property legally entitled to care and protection of the company, would be unreasonable and oppressive; and the fact that such trespasser is an infant does not affect the legal right of the company, because signals of approaching engines must be given and oversight of the tracks exercised, uniformly and habitually, or not at all, and for protection and safety of all trespassers or none."

As aptly said by this court, a railway company is not required to provide extra employes to warn or look out for the presence of persons having no right in its

yards, and when the plaintiff in error employed an extra watchman to patrol the tracks in this part of its yards it did more than the law required of it, and such act successfully refutes any claims of acquiescence on its part in permitting persons to enter its yards and cars.

In *Flores vs. Atchison, T. & S. F. Ry. Co.* (Texas), 66 S. W. 709, in which it was alleged that the railway company maintained its tracks in a populous part of the city of El Paso, and that numerous persons, including children of tender years, had been accustomed to pass back and forth under the cars, and that children were accustomed to playing on or near the track, "having been attracted there by defendants' negligence in leaving the cars as they did on the said track, and that defendants, without signals or warning, or without having a proper lookout, moved the cars and ran over the child, which was then about six years of age," etc., the court held:

"Where a string of cars about half a mile long was standing on a railway track, and a child six years old went onto the track, and under one of the cars, without the knowledge of the railway employes, and without any right, the law did not impose on the employes the duty of exercising any care to ascertain his perilous position before driving their engine against the cars."

Shea vs. Concord & M. R. R. (N. H.), 41 Atl. 774.

"An unoccupied lot, on which boys were accustomed to play, lay adjacent to defendant's tracks. Intestate, after playing awhile, crossed the track south of the playground and leaned against a car, which was bumped by others, and he was injured. At the point of the accident there was no passageway. The use of the ad-

joining field as a playground was confined to the portion north of where the accident occurred. There was no evidence that defendant's servants, in the exercise of ordinary care, should have seen intestate and taken precautions for his safety. Plaintiff sued to recover for injuries suffered by intestate. Held, that a motion for non-suit should have been granted."

McEachern vs. Boston & M. R. Co. (Mass.), 23 N. E. 231.

"A declaration alleging that defendant left a freight car standing on one of its sidetracks and negligently allowed the door, which it knew was not properly attached to the car, to remain open and unlocked, knowing that it would be an enticing object to children, and that plaintiff, 11 years old, traveling on the street in the vicinity of the sidetrack, saw the car with its door open, and was thereby enticed to look into it, and in so doing carefully touched the door, which fell upon him, states no cause of action."

Nashville, C. & St. L. Ry. Co. vs. Priest (Ga.), 45 S. E. 35.

"The plaintiff being a trespasser upon the premises of the defendant railway company, it owed her no duty of protection until her presence was actually discovered by its servants, notwithstanding she was a child of tender years; and it not affirmatively appearing from the allegation of her petition that, after she was seen by one of the defendant's employes, the conduct of any of them was so grossly negligent as to indicate a wilful and wanton disregard for her safety, the company's general demurrer should have been sustained."

The same rule has been repeatedly announced by the Supreme Court of Washington. In *Matson vs. Port Townsend Southern R. R. Co.*, 9 Wash. 449, the court said:

“The undisputed proofs showed that none of those operating the railroad train had any reason to suspect the presence of the plaintiff upon the right-of-way until after the accident. This being so, he can get no benefit from the fact of his being of tender years, for, while it is true that the duty of the railroad company to a child, upon discovering him upon its right-of-way, would be different from what it would be in the case of an adult, yet this obligation would not arise until it had notice of his presence. Until it had such notice it owed no duty to him, even though he was of tender years. The plaintiff being a trespasser, and the injury having been committed without any knowledge on the part of the appellant, or any of its agents, of the fact of his presence in the vicinity, the most that could be claimed in his behalf would be that the company would be liable in case of such gross negligence on its part as was equivalent to wantonness. The proof as to the circumstances surrounding the accident and leading thereto entirely failed to establish any such degree of negligence.”

In the case of *Johnson vs. Great Northern Railway Co.*, 49 Wash. 98, two small boys got onto a freight train with the knowledge and consent of the brakeman, and, after riding a distance, they got off at a stop made by the train, and when the train again started they again got on the train without the knowledge of any of the trainmen. The court, in discussing the case, said:

“It seems quite clear from these facts that there is no evidence of negligence on the part of the defendants in this case. If the respondent was a trespasser upon the train, the appellants owed him no duty except not to wantonly or wilfully injure him. It is claimed by respondent that he was not a trespasser, because he was invited by the brakeman to ride on the rear car. It was not shown that the brakeman had any authority to invite any person to ride on the train. On the contrary, it was shown that the train was in charge of the con-

ductor, who was upon it at his station, and that it was generally known that boys were not permitted to ride thereon. The case in this respect is similar to the case of *Curtis vs. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955, where we held that a boy, who had been driven away and subsequently was invited into a dangerous place by persons unauthorized so to do, was still a trespasser.

“But assuming for this case that the respondent here was a licensee, and that the other appellants were bound by the negligence of Kassebaum, it was the duty of the appellants then to exercise reasonable care to see that respondent was not injured. *McConkey vs. Oregon R. & N. Co.*, 35 Wash. 55, 76 Pac. 526. This required the appellants to do no more than an ordinary prudent person would do under the same circumstances. The boys rode with the brakeman on the rear car until they came to Blackman’s mill. There the boys got off the train. They did not tell the brakeman that they intended to go further. The brakeman did not see them, and did not know that they were on the train after that time. He did not know where they were, and no other member of the train crew knew that the boys were about the train at all. Before any negligence could be charged against any of the defendants it was necessary to show that they had notice that the boys were on the train and likely to do, or were attempting to do, what they did do. None of these facts were shown. When the boys left the train at Blackman’s mill, the brakeman had a right to suppose that they would not again climb onto the cars unless something occurred to notify him otherwise. He certainly could not be held to look after their safety when he did not know, and had no reason to know, that they were on the train. It is true, the boys testified that they might have been seen by the train crew as the train passed around a curve when they were on top of the cars, but it is quite clear that it was then too late to have prevented the injury, even if the trainmen could be held to know it would occur. We see no evidence of negligence in the case sufficient to take it to the jury.”

As here said, the brakeman "*certainly could not be held to look after their safety when he did not know and had no reason to know that they were on the train.*" So in the case at bar, the switchman moving these cars did not know and had no reason to know that the defendant in error was in the car.

The rule we are here contending for is the same in the federal court as in the state courts.

"Defendant railroad company opened a freight train at a point where two paths crossing the track converged, near the center of a city block. These paths had been used freely by workmen and others who were accustomed to cross the tracks for a long time. Plaintiff, a boy of 8½, was injured while crossing through the opening between the cars by being run over by the train while being closed together, after he had tripped and fallen over a rail. Held, that plaintiff was a mere licensee, as to whom the railroad company was under no obligation to give warning before the closing of the cut, and that it was therefore not liable."

Schmidt vs. Pennsylvania R. R., 181 Fed. 83.

In *Felton vs. Aubrey*, 74 Fed. 350, from a very lengthy opinion by Judge Lurton, we quote the following:

"If, under the principles we have endeavored to announce, the railway company was entitled to the exclusive use of this track, then the defendant in error was a trespasser, and the company owed him no duty until his danger was discovered. If he was a trespasser, the fact that he was of immature years imposed no higher duty on the company, until his danger was discovered, than if he had been an adult. The railway company was no more required to keep a lookout for infants than for adult trespassers."

If, as we contend, the defendant in error was a trespasser, then the railway company owed him no duty until his presence in the car was discovered by the employes engaged in moving the cars. The evidence clearly shows that he was not discovered prior to his injury, and he could not have been discovered unless the trainmen had walked back about the full length of the string of cars, a distance of about 650 feet. It may be claimed that the switchmen should have seen the little wagon and cart, but the wagon and cart were on the east side of the cars, between the cars and Dock street, and only two or three feet from the cars, and the trainmen were working on the west side of the cars and on the inside of the curve of the track, where their duty required them. Even had they been on the east side of the cars, their view of the north end of the string was shut off by the body of the cars on the curve, unless they had gone east across Dock street.

HOW DID THE ACCIDENT OCCUR?

The defendant in error claimed that he was in the car sweeping up loose wheat at the time the engine coupled onto the cars, and that the jolt threw him out of the side door on the east side of the car, and that he fell under the car so that the wheel passed over his leg. This, we suggest, would be a physical impossibility. The cars are much wider than the track, so that the side of the car overhangs the rail a distance of from thirty to thirty-six inches, and had he been thrown out of the side door of the car he could not have possibly fallen under the same so that the wheel would have passed over his leg.

The witness Raymond, who was called by the defendant in error and who was the only witness to the accident, gave a very clear description of how it occurred. He testified that he heard and saw the cars move north when the engine coupled onto them, and saw the boy reaching under the car in front of the trucks getting his broom, which was lying between the rails. That as the cars moved south the clothing of the boy was caught by the boxing and he was dragged along on the ground and his leg mangled by being caught against the ties. He examined the track and there was no evidence that the wheel had passed over his leg.

The injury to the defendant in error did not occur on a public crossing, but on the private premises of the railway company, on one of its tracks west of Dock street, where there were about six tracks paralleling each other, as shown by the evidence, and the railroad yards widen out after passing north of 11th street, where there is more space between the waterfront and the bluff, and at the foot of 9th street "there are probably fifty or sixty tracks, and usually five or six switch engines are working in there and the switchmen are kept quite busy with their work," as shown by the evidence of the witness Farley.

We believe we have successfully shown to the Court that under the evidence in this case and the law the plaintiff in error is entitled to judgment in its favor.

ASSIGNMENT NO. 1.

Over the objection and exception of the plaintiff in error, the defendant in error and his cousin Maggie

were permitted to testify to conversations had with a man standing at a switch stand under the 11th street bridge to the effect that this man directed them to these cars and told them that there was lots of wheat over there in the cars and that they had better hurry over before other boys and girls got it. Other witnesses were called who testified over the objection of the plaintiff in error that switchmen knew that persons were in the habit of getting wheat out of the cars and that the switchmen made no objection.

This evidence was admitted by the court for the purpose of showing knowledge on the part of the railway company that the plaintiff was in the car at the time he was injured. The ruling of the court is as follows:

“I do not think the permission of this man would be any excuse unless it is shown he had authority. I will permit this testimony for the purpose of showing he had knowledge that the boy was there, but any statement he may have made the jury will disregard.”

Record, pp. 24-25.

It was not shown that this man was an employe of the defendant, and even if he was it was not shown that he had any authority to direct or permit persons on the premises or in the cars of the company. Again, even if this man knew that they were in the cars, he was not a member of the crew engaged in moving these particular cars, and it is plain that no member of that crew possessed such knowledge. It was conceded that switchmen had no authority to permit children to enter cars, as shown by the following:

“Q. Has the switchman any authority to permit children to enter box cars?”

A. No, sir.

MR. BATES: I understand your honor has ruled as a matter of law that they have not any authority.

THE COURT: I have ruled as a matter of law that there is no testimony in the case up to the present that a switchman has any such authority, and if there is no further testimony on that question I will so instruct the jury.

MR. BATES: We do not intend to introduce any evidence along that line.

THE COURT: In the present state of the testimony I will charge the jury as a matter of law that a switchman has no authority to authorize a person to go in a car for any purpose whatever.

MR. QUICK: Then it will not be necessary to offer any evidence on that question.”

Record, pp. 54-55.

It was further shown that all switchmen working in the yards are instructed to keep children off the cars and away from them.

Record, pp. 59.

Even if some switchman working in the yard, in violation of his express orders and duties, permitted or even invited some child into a car, his unauthorized act in doing so would not impose a liability on the railroad company.

In *Curtis vs. Tenino Stone Quarries*, 37 Wash. 355, a boy about six years old was invited into the power house by two other boys who were working there, and

while there pursuant to the invitation, was injured. The court said:

“These two boys were simply employes in the power house. They were not in charge of the building and did not represent or act for the owner in any way. They had no authority to invite strangers there or to impose burdens or obligations upon their employer in so far as trespassers were concerned. There is no pretense that the appellant was invited there by any person authorized to speak for the respondent, or that any officer of the respondent had any knowledge of his presence.”

In *Johnson vs. G. N. R. Co.*, 49 Wash. 98, the court said:

“It seems quite clear from these facts that there is no evidence of negligence on the part of the defendants in this case. If the respondent was a trespasser upon the train, the appellants owed him no duty except not to wantonly or wilfully injure him. It is claimed by respondent that he was not a trespasser because he was invited by the brakeman to ride on the rear car. It was not shown that the brakeman had any authority to invite any person to ride on the train. On the contrary, it was shown that the train was in charge of the conductor, who was upon it at his station, and that it was generally known that boys were not permitted to ride thereon.”

In *Fischer vs. Columbia & P. S. R. Co.*, 52 Wash. 462, the same principle is asserted, and the decisions of other courts cited, among which is *Flower vs. Pa. R. Co.*, 69 Pa. St. 210, where a locomotive fireman asked a boy ten years of age to put the hose on the tender and turn on the water. The boy, complying with the request, climbed up on the side of the tender when some detached cars struck the tender and the boy was killed, and the

court there held that the act of the fireman was not within the scope of his authority and the company was not liable.

Also the case of *Snyder vs. Hannibal etc. R. Co.*, 60 Mo. 413, where the servants of the company had been in the habit of permitting the injured boy and other boys to jump on the train and ride between certain points in the city, the court held:

“The mere fact that a tortious act is committed by a servant while he is engaged in the performance of the service he had been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must appertain to the particular duties of that employment.”

In *Howard vs. Kansas City, F. S. & G. R. Co.* (Kas.), 21 Pac. 267, the court held that it may be doubted whether it is within the scope of the employment of the brakeman of a freight train to direct persons traveling along a street, and who are not connected with the train or the service of the company, to climb through the train, and that such act of the brakeman would not bind the company.

In *Studer vs. Southern Pacific Co.* (Calif.), 53 Pac. 942, it was held that a boy twelve years old could not recover for injuries sustained by him while climbing through between the cars of a train standing on a public crossing.

In *Russell vs. Central of Georgia Ry. Co.* (Ga.), 46 S. E. 558, it was held that where the only employe of the company who saw and knew that the plaintiff was

attempting to pass through a train by climbing over the bumpers at a public crossing was a watchman, such knowledge was no notice to or knowledge by the company.

In *Southern Railway Co. vs. Clark* (Ky.), 105 S. W. 384, it was held that where a person was injured by attempting to climb over a freight train at a public crossing at the invitation of the brakeman and was injured, the railway company was not liable.

In *Daugherty vs. Chicago, M. & St. P. Ry. Co.* (Iowa), 114 N. W. 902, a boy seven years old was invited by the section men to get on a handcar for a ride. The foreman ordered the men to help the boy on the car, and while the car was moving the boy fell off and was injured. The court held: “*An act done by a servant while engaged in his master’s work, causing injury to a third person, but not done for the purpose of performing that work, can not be deemed the act of the master.*”

Although the boy was placed on the handcar by the section men at the direction of the foreman, such act on their part was outside the scope of their authority and did not render the master liable for injuries received by the child.

“An employer is not bound by the act of his employe, not his *alter ego*, in inviting or permitting children to be upon the premises.”

Formall vs. Standard Oil Co. (Mich.), 86 N. W. 946.

The rule is stated as follows by Judge Phillips, speaking for the Court of Appeals, Eighth Circuit, in quoting from the case of *Eaton vs. Delaware R. Co.*, 57 N. Y.

394, in the case of *Clark vs. Colorado & N. W. R. Co.*, 165 Fed. 408:

“But it is said that by the act of the conductor the plaintiff was lawfully on the train, and that for this reason the defendant was liable to him for the negligence of its servants. With due submission, this is simply begging the question. The plaintiff could only be lawfully on the train by an authorized act of the conductor. The question still recurs: Had the conductor the authority to take plaintiff on the train? If not, he could not lawfully be there. It is not necessary to consider whether he was a trespasser. It is enough to hold that a duty to be careful toward him would only spring up on the part of the defendant by an act on the conductor’s part coming within the scope of his authority.”

In these cases some employe of the railway company knew of the perilous position of the person injured, and in some of the cases the person injured was placed in such position by the invitation of some employe acting outside the scope of his authority, but such knowledge or such invitation did not impute notice to the master, or impose on the master a liability for the injury sustained. So in the case at bar. The person whom it is claimed directed the plaintiff to the car to get the wheat, even if he was a switchman, was acting outside of his authority and not performing any duty in relation to the services he was employed or directed to perform for the master.

So, if the switchmen had no authority to permit children in the cars—and this is conceded—then knowledge on the part of such switchmen that children sometimes did get on the same would not be notice to the company of that fact. But in this case the evidence is uncontra-

dicted that the switchmen handling these cars had no notice or knowledge that there were any children thereon.

ASSIGNMENT OF ERROR NO. 4.

The court instructed the jury as follows:

“If you find that at the time of the injuries complained of in the complaint, and for some time prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant’s track and sweeping the wheat up and gathering the wheat from in and about said cars, and if the defendant, its servants and employes knew of such custom, or by the exercise of ordinary care and observation could have known of it, then I instruct you that the defendant Railroad Company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

You are instructed that in determining whether or not the defendant, its servants and employes were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employes at and about the point where and the time when the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars.”

Record, pp. 61-62.

The plaintiff in error duly excepted to the giving of this instruction for the reason that it "imposes upon the defendant the duty of exercising ordinary care to prevent accidents to trespassers, and would make the defendant liable for an injury received by the plaintiff where the defendant was without knowledge that plaintiff was upon its cars or in a place of danger."

Record, pp. 65-66.

If the defendant in error was a trespasser—and under the uniform holding of the court he certainly was—then this instruction was clearly erroneous and prejudicial. By its terms the Railway Company is made the general guardian of all persons who wrongfully enter upon its premises, and especially of those who have entered there for an unlawful purpose. As frequently stated by the courts, the rule is the same as to children as it is to adults who are trespassers. The fact that the defendant in error was only 11 years of age at the time he was injured does not change his legal status or impose any additional burden upon the Railway Company. In these railroad yards, extensive as they are shown to be by the evidence in this case, it is quite frequent that persons, both in the daytime and in the night time, enter the yards for the purpose of stealing merchandise from the cars, and thefts of this character are often committed. Let us suppose that the defendant in error in this case was an adult and had gone into the yards where there were cars loaded with merchandise, and had gone into one of such cars for the purpose of stealing articles of merchandise from it, and while there he had been injured in the same manner as this accident occurred. Would the court, for one

moment, hold that the Railway Company was responsible? The purpose for which the defendant in error entered the cars was no more lawful than in the case we have suggested. His infancy and lack of knowledge and experience in no way changes the rules of law applicable thereto, and no other or greater duty was owed him than if he had been an adult engaged at the time in stealing merchandise from the cars. The instruction, therefore, imposed upon the Railway Company a duty and obligation not sanctioned by law, and one which would make the company an insurer of the safety of every person wrongfully entering its railroad yards or there for an unlawful purpose. There is no claim anywhere in the evidence that the switching crew handling these cars knew, or by the exercise of ordinary care consistent with the usual and ordinary mode of handling its cars, should have known, of the presence of the defendant in error.

We, therefore, respectfully insist that the judgment in this case should be reversed, and also that an order be entered dismissing the case.

Respectfully submitted,

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IN THE
United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,

Plaintiff in Error,

vs.

TONY CURTZ, a Minor, by AGNES
CURTZ, Guardian *ad litem*,

Defendant in Error.

No. 2098

UPON WRIT OF ERROR FROM THE UNITED
STATES CIRCUIT COURT, FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
WESTERN DIVISION.

Supplemental Brief of Defendant in Error

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Supplemental Brief of Defendant in Error

It is stated in our brief that, "It is admitted that the cars were standing on Dock street." We did this because Mark Maloney, Tony Curtz, Maggie Slabb, Clark, Raymond, Edwin Wolfe say so, and they are all witnesses who testify on that point—AND NOT ONE CONTRADICTS THEM.

The evidence which Appellant in Error quotes in his brief *does not relate to the location of the cars at all. It refers solely to the location of the tracks.* It agrees with the evidence of defendant in error.

Were the cars on Dock street?

I. Mark Maloney, page 32, Record, says: "There was one track at 11th street IN Dock street, and then there were several tracks west of Dock street. * * * I saw Tony and a boy and a girl with him over under the 11th street bridge. They went up towards the cars, the string of cars ON Dock street. * * * These cars were on the track that runs *across Dock street there at the bridge.* Page 33. I got into one of the cars from the water side and I think the other got in from the water side, too.

Edwin Wolfe, p. 36: "I was down there the day Tony got hurt. I came down by the 11th street bridge and *I saw him there a little south of the bridge.* Tony was going to get into the car when I saw him."

F. L. Raymond, p. 40: "Were you there the day Tony Curtz got hurt? A. Yes. Q. Where were you at that time? A. At the time I should judge *I was about even where the switch leads off from the track on the west side of Dock street.*" His next answer quoted in appellant's brief shows he was about 75 feet south of 11th street bridge, and that there was a string of cars between him and the bridge, or on the track which leads

from the switch *across Dock street*. This is just the place where Mark Maloney put them. This witness also shows they were ON Dock street.

Raymond, p. 47: "When you came out from the dock and turned south with your sugar you saw two carts there? No, sir; I did not notice the two carts. I only noticed one little two-wheeled cart. Q. That was outside of the car? A. Outside the track, yes, sir."

Clark, witness for plaintiff in error, p. 58, of Record: "I saw the children IN the cars just a few minutes previous to the accident * * * The string of cars extended past where I was working *up to about the bridge.*"

Tony Curtz, p. 25: "The cars were this side, *that is south of the 11th street bridge, and about as far as across the street.* P. 26: The car I went into was the end car of the string of cars standing there. P. 27: The boy and girl who were with me did not get into the same car I did. *They got into some other cars on the same track.*"

Maggie Slabb, p. 28: "When we went down the steps onto the tracks, *we then went south, about the distance of across the street, from the bridge to the cars.* P. 29: I saw cars standing on the track south of the bridge. * * * We went down to where the cars were and I got up on a car* * *"

Raymond, p. 39: "The tracks between 11th street and 15th street are west of Dock street, between Dock street and the bluff, and this one track *switches off about 100 yards south of the bridge, and it angles across Dock street.*"

This last statement of witness Raymond shows

that the track runs *on* and *over* Dock street, "angles across Dock street," is the way he puts it, for 100 yards, or 300 feet.

All the witnesses who testify about the cars the children got in put them from 75 to 100 *feet south of the bridge. This would bring them all on Dock street.*

The evidence quoted by appellant in error does not contradict this. It nowhere refers to the SITUATION of the CARS, but entirely to the number, *location and direction* of the TRACKS.

Our statement, in our first brief, that the cars were *on* Dock street and that it is so admitted is, therefore, correct. A careful examination of all the evidence will show that at no place is this controverted.

This shows that the cars were *on a public street* and not on the *private property* of the plaintiff in error, and all our authorities cited on the question of licensee and invitee are in point. The cases would be in point even if the cars were on the railroad right of way, as license can exist there also.

The Clarke and Barney cases are not in point. They refer to boys catching onto *moving cars*, at a place where there was *no license* and where the courts say the company had no cause to anticipate their presence and the case from 134 S. W. 858 is clearly distinguishable from the case at bar.

The evidence clearly shows that the plaintiff in error knew that children and men had been habitually, continuously and openly accustomed to be in and upon the cars at this public place and especially on Saturday, and that this was Saturday and there were six or seven small children there "sweeping wheat." and the evidence further shows that the plaintiff in error *knew* that the defendant in error was there with his two little companions doing what the plaintiff in error had invited them to do, at least impliedly, by a well established custom extending over six years, and with that knowledge and acquiescence in their minds, the cars were moved with such carelessness that it is a great wonder that more were not injured—when a little bit of care on the part of any one of the three or four switchmen would have avoided all danger. The leading "turntable" case in the U. S. Courts, the Stout case, is also the leading case on license and invitation by corporations, and we cited it and we also cite the McDonald case (U. S.), 38 Lawyers' Edition, 434, and we claim that these cases and the cases cited from this Circuit control the law in favor of an affirmance of the judgment in this case.

HEBER McHUGH,
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Attorneys for Defendant in Error.



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Reply Brief of Plaintiff in Error

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Reply Brief of Plaintiff in Error

Counsel for defendant in error having predicated their argument in their brief on a false basis for the purpose of showing that the injured party was a licensee, it makes it necessary for us to present a short reply brief.

On page 11 of their brief they say, "*It is admitted that the cars were standing on Dock Street,*" and again on page 14 of their brief they say, "It must always be remembered that, in the case at bar, *the cars were on a public street; left there to suit the convenience of the railway company, and on a public crossing; that the additional duty rested on the Railway Company to use some degree of care in moving these cars so as not to injure people who might be passing over the crossing which they were obstructing, partially, at the time.*"

All through their brief they have presented this case as though the cars were standing *on a public street or upon a public crossing* and that a person rightfully using the street or the crossing had been injured through the negligence of the employes of the Railway Company to anticipate the presence of such person *on the street or public crossing*. This is an unfair and incorrect presentation of the facts as shown by the record in this case. The fact is that all the tracks of the Railway Company between Eleventh Street and Fifteenth Street were west of Dock Street except where the track on which the cars were located, one of which plaintiff was in, crosses Dock Street under the Eleventh Street bridge. None of the eighteen cars standing on this track were in Dock Street, but all were west of Dock Street and south of the Eleventh Street crossing, and the record is full of the statements of the witnesses to this effect.

Willie Therkileson testified: "One of the tracks crossed Dock Street there at the Eleventh Street bridge,

and Dock Street runs on the east side of the tracks from Eleventh Street to Fifteenth Street". (Record, p. 37.)

The witness Farley testified: "Between Eleventh Street and Fifteenth Street there are six tracks. The one on the east side crosses Dock Street at the Eleventh Street bridge, then runs on the east side of Dock Street close up to the warehouse." (Record, p. 38.)

The witness Raymond testified: "Dock Street runs between Ninth Street and Fifteenth Street and one of the railroad tracks crosses Dock Street just south of the Eleventh Street bridge, and then runs north on the east side of Dock Street and close to the grain warehouse. *The tracks between Eleventh Street and Fifteenth Street are west of Dock Street, between Dock Street and the bluff*". (Record, p. 39.) He further testified: "There was a string of cars. I was pretty near up to the end of the cars when the engine hitched onto them, and that was, I should judge—about 75 feet south of the Eleventh Street bridge." (Record, p. 40.)

The witness Trow testified: "*This track does not run in Dock Street, but parallels the street and then crosses it on an angle up at Eleventh Street bridge.*" (Record, p. 55.)

The witness Clarke testified: "I was loading poles on a wagon on the west side of Dock Street about 150 or 175 feet from where the boy was hurt. *These poles were east of the track the cars were on, between the track and the street.*" (Record, p. 58.)

It, therefore, appears by all the evidence that the cars in question were not on Dock Street or on a public crossing, but were on the *private property of the Railway Company*. The authorities, therefore, cited in the brief of counsel for defendant in error in cases where the injured was a licensee are not in point, and for the purpose of making them appear in point counsel must have felt themselves justified in saying, "It is admitted that the cars were standing on Dock Street," when no such admission was made either on the trial of the case or in our opening brief, and as a fact the cars were not in Dock Street.

The doctrine of the "turntable cases" is not in point and can not be applied to a case of this character; it has been expressly repudiated when attempted to be applied to such a state of facts. As was said in the case of *Clarke vs. Northern Pacific Ry. Co.*, 29 Wash. 139, at page 149:

"We are not aware of any case which holds that the operation of trains over railroad premises makes them dangerous machines within the meaning of the turntable cases. It was expressly held that they are not such within the meaning of the rule in (Citing cases)."

It is suggested by counsel in their brief that no warning was given that these cars were about to be moved. It has been expressly held, as shown in our opening brief, that the exercise of due care does not impose upon the Railway Company the duty to send a man to examine a string of cars standing on a side track before they are coupled onto by an engine for the purpose of seeing if

some child, or children, is in or under the cars. The only warning that they can claim should have been given would be by ringing the bell or blowing the whistle on the engine. This engine was more than 650 feet distant from the point of accident. What notice would the ringing of the bell or the blowing of the whistle on this engine impart to a person in a freight car some 650 feet distant, especially when it is shown that in the yard a little further north several engines were at work? How would a person in the car, engaged in sweeping up loose wheat for his chickens, know that the whistle or the bell was intended as a notice that those cars were to be moved? It does not seem to us that such a proposition merits serious consideration. It was shown that the tracks north as far as Ninth Street, a distance of about a mile, were used for the handling of cars loaded with grain. It appears to us that to affirm the judgment would simply say that the Railway Company must examine every car, not only in this part of its yard, but in every other portion of its yard, before the same can be moved, for it is well known that men and boys not only go into the yard for the purpose of getting wheat, but they go there for the purpose of taking other kinds of merchandise and for the purpose of picking up the loose pieces of iron they find along the tracks in the yards, and this no railway company has ever been able to prevent.

ADDITIONAL AUTHORITIES.

We desire to call attention to the case of *Barney vs. Hannibal & St. J. R. Co.* (Mo.), 28 S. W. 1069, which decision has come to our attention since writing the opening brief in this case. We call special attention to this decision on account of the facts being in many respects similar to the case at bar and because of the very able opinion of the court in which the authorities are collected and discussed.

In the Barney case, children customarily played in the yards of the Railway Company and frequently rode on the moving cars as they were being switched. The employes of the Railway Company had been directed by their superiors to keep the children out of the yard, but "there was evidence, however, that defendant's employes did not obey their instructions at all times, but frequently, and without rebuke, would let the boys ride on the cars."

The court, among other things, in the opinion said:

"Ordinarily, a man who is using his property in a public place is not obliged to employ a special guard to protect it from the intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such vehicle to keep an outrider on purpose to drive such boys away, and that, if he does not, he is liable to any boy who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred."

In this case it is also shown that the doctrine of the turntable cases does not apply under the facts set forth in the case at bar.

To the same effect is the very late case of *Louisville & N. R. Co. vs. Ray* (Tenn.), 134 S. W. 858, to which we also call attention.

Respectfully submitted,

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825











